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13:34:17 1 (Open Court)

13:34:17 2 THE COURT: This is Cause Number 12-CV-297 on my
13:34:21 3 docket. Let me hear from you-all as to who's here and who you
13:34:28 4 represent.

13:34:29 5 MR. KING: Your Honor, Patrick King from Simpson
13:34:32 6 Thacher representing CSR.

13:34:34 7 MR. DANLEY: Your Honor, Jeff Danley, also from
13:34:37 8 Simpson Thacher, representing CSR Technology.

13:34:40 9 MR. KING: And with us today is Dr. Robert Akl, who
13:34:43 10 is an expert, who is going to provide, with the Court's
13:34:46 11 Permission, a short technical tutorial at the beginning of the
13:34:49 12 presentation.

13:34:49 13 THE COURT: All right. Thank you.

13:34:51 14 MR. DINOVO: Good afternoon, Your Honor. Drew DiNovo
13:34:53 15 on behalf of Defendant Bandspeed.

13:34:55 16 MR. SABA: Good afternoon. John Saba, Your Honor, on
13:34:57 17 behalf of Bandspeed from DiNovo Price as well.

13:35:05 18 THE COURT: Very good. All right. We had a phone
13:35:10 19 call indicating that y'all might want to do briefly on a
13:35:13 20 tutorial; is that correct, before we get started?

13:35:15 21 MR. DINOVO: Your Honor, we were notified by the
13:35:18 22 plaintiff that they intended to do that. And we asked the
13:35:20 23 Court, and the Court said that they were open to it. So,
13:35:24 24 unfortunately, our expert was unavailable on that short
13:35:27 25 notice. What we have is a short tutorial that you will have

13:35:30 1 the unfortunate requirement that I be presenting it, but it
13:35:34 2 will be with his endorsement.

13:35:37 3 THE COURT: Well, let me -- let me say this. We said
13:35:41 4 that I certainly didn't mind commencing this with a tutorial.
13:35:53 5 I don't know whether it is necessary that it be totally
13:35:56 6 separate from what you're otherwise doing or whether we just
13:36:00 7 kind of incorporate it into your presentations. You can use
13:36:07 8 that as a beginning and then get into your argument, and then
13:36:11 9 you can present whatever you want to present and get into your
13:36:15 10 argument. I think that might make things flow a little better
13:36:19 11 at this point than trying to give you X number of minutes for
13:36:22 12 tutorial and then breaking. What is your feeling on that,
13:36:25 13 Mr. King?

13:36:26 14 MR. KING: Your Honor, I respectfully think that it
13:36:30 15 may be to the advantage to have the tutorials done separately
13:36:33 16 at the front. That's only because the court reporter, as I
13:36:37 17 understand it from conversations I've had with Mr. DiNovo, we
13:36:40 18 don't expect the testimony of the experts and what Mr. DiNovo
13:36:47 19 plans to read to be on the record. So we could do that
13:36:50 20 initially up front off the record because it's not evidence and
13:36:53 21 then go into the argument. But I'm happy to do it in whatever
13:36:58 22 way the Court prefers.

13:37:00 23 THE COURT: No. That just confirms everything else
13:37:03 24 about these cases. Everybody has a way they want to do it that
13:37:07 25 is different from the way the Court wants to do it.

13:37:14 1 Ms. Rodriguez, you need to hang around, but you don't
13:37:14 2 need to put this on the record.

13:37:14 3 (Tutorial)

14:05:21 4 THE COURT: Mr. King, you may proceed.

14:05:24 5 MR. KING: Your Honor, if I may I approach the
14:05:26 6 Bench. I have two copies of our slides, one for you and one
14:05:31 7 for your clerk.

14:05:32 8 THE COURT: All right. Thank you.

14:05:40 9 MR. KING: Thank you, Your Honor, for giving us an
14:05:41 10 opportunity to present our proposed constructions. Again, I'm
14:05:45 11 Patrick King, representing CSR technology. I want to go --
14:05:51 12 give you a little idea of the structure of presentation today
14:05:55 13 that I'll be offering.

14:05:56 14 I'd like to start with a little bit of background on
14:05:58 15 the patent just so you have a sense of what the patent is and
14:06:02 16 where it came from. I'll describe the claim construction
14:06:06 17 methodology we use to approach our constructions. I know that
14:06:10 18 you're well aware of the intricacies of the claims
14:06:13 19 construction, so I'm not going to spend a lot of time on that.
14:06:16 20 And then we'll go through each of the claims and describe why
14:06:19 21 we take the positions we do and why I believe Bandspeed's
14:06:22 22 positions are not the preferred positions.

14:06:26 23 The patent is the 6,792,247. It's a -- the patent
14:06:32 24 was issued on September 14th, 2004. It's -- the inventors are
14:06:38 25 Hock Law and Dennis Kwan, and it was originally assigned to a

14:06:43 1 company named Microtune, Incorporated in San Diego. The
14:06:46 2 original application of this patent was filed May 8th, of 2011
14:06:51 3 and claims priority to two provisional applications.

14:06:54 4 In Bandspeed's briefing they suggested that we bought
14:06:58 5 this patent to bring suit against them. I just want to make
14:07:02 6 clear that the patent was originally assigned to Microtune in
14:07:05 7 September of 2004. Microtune was then acquired in a strategic
14:07:10 8 acquisition by Zoran Corporation in September 2010, and CSR
14:07:15 9 acquired Zoran in a strategic acquisition in February of 2011.

14:07:20 10 We have gone over both Dr. Akl and Mr. DiNovo
14:07:24 11 described the basic construct of the patent, and the abstract
14:07:27 12 describes it. The method is described and comprising receiving
14:07:33 13 a synchronization packet transmitted from a first device;
14:07:37 14 receiving a data packet transmitted from the first device, the
14:07:40 15 data packet being offset from the synchronization packet by a
14:07:46 16 particular amount of time; and identifying the first device
14:07:49 17 base on the amount of time from which the data packet is offset
14:07:53 18 from the synchronization packet.

14:07:56 19 That language is very closely related to claim one,
14:07:58 20 and we'll go through each of those later.

14:07:58 21 We are asserting eight of 27 claims -- two
14:08:01 22 independent claims and six dependent claims. And these are
14:08:05 23 terms for construction. It's seven terms in all. The first
14:08:08 24 three are closely related: "Packet," "synchronization packet,"
14:08:13 25 and "[first] data packet." They appear in claims 1, 2, and

14:08:17 1 20. I guess the "[first] data packet" only goes to 1 and 20.

14:08:20 2 There are some additional dependent claims that
14:08:24 3 incorporate these terms by reference, but they only appear in
14:08:26 4 the claims noted. "Periodically" appears only in claim two.
14:08:30 5 "Offset" and "timing offset" we have proposed construction --
14:08:32 6 the same construction for both terms because we believe each
14:08:36 7 term means the same thing, and they appear in claim one and
14:08:38 8 claim two. And, finally, "host processor environment" in claim
14:08:42 9 25.

14:08:43 10 So let me tell you a little bit about how we
14:08:46 11 approached claim construction. The courts have made it clear
14:08:50 12 that claim construction should focus on intrinsic evidence, and
14:08:53 13 we tried our best to do that, focusing first on the claims and
14:08:56 14 then look at the claims and the specifications as they shed
14:09:00 15 light on how the claim is being interpreted and, finally,
14:09:04 16 prosecution history.

14:09:05 17 As the courts have noted throughout the recent
14:09:09 18 history of claim construction, extrinsic evidence is helpful
14:09:13 19 but secondary to intrinsic evidence. I know the Court is well
14:09:16 20 aware of that. And, as I said, our constructions, we tried
14:09:20 21 very hard to focus on the claims and specification.

14:09:23 22 Bandspeed in contrast has -- their constructions rely
14:09:29 23 heavily on extrinsic evidence, primarily on dictionary
14:09:32 24 definitions and Bluetooth specification and, finally, on the
14:09:36 25 prosecution history of a later patent application.

14:09:39 1 First on the dictionary definitions, the extrinsic
14:09:47 2 evidence of this nature should be given less weight. I think
14:09:49 3 there are certainly instances where the Court may wish to look
14:09:52 4 at dictionary definitions, but they shouldn't be used to take
14:09:56 5 the claims in a different direction than are described in the
14:10:00 6 specification.

14:10:01 7 Mr. DiNovo in his technical presentation, and I'm
14:10:04 8 sure you'll hear more in his presentation to the Court, spent
14:10:08 9 quite a bit of time talking about the Bluetooth specification
14:10:11 10 and saying the Bluetooth specification -- the Bluetooth
14:10:15 11 embodiment was the primary embodiment of the patent. I just
14:10:19 12 want to make sure this is clear right up front: The patent
14:10:23 13 does describe Bluetooth implementation as a preferred
14:10:26 14 embodiment. It's not limited to Bluetooth. There's little
14:10:29 15 dispute of that.

14:10:30 16 If you look at the cited paragraph from column 6,
14:10:34 17 line 38 through 43, it says: While the embodiments described
14:10:38 18 focus on Bluetooth protocol, many of the underlying principles
14:10:42 19 of the invention may be -- may practiced using various other
14:10:45 20 types of wireless and terrestrial protocols. Accordingly, the
14:10:52 21 scope and spirit of the invention should be judged in terms of
14:10:55 22 claims which follow.

14:10:55 23 So now let's look at the claims which follow. And
14:10:57 24 this makes it crystal clear that this is not a Bluetooth-only
14:11:01 25 method.

14:11:02 1 Claim 21 is, The wireless apparatus as in claim 20
14:11:09 2 further comprising: Bluetooth protocol logic configured to
14:11:13 3 communicate with wireless devices according to the Bluetooth
14:11:17 4 protocol.

14:11:17 5 This is a dependent claim that claims Bluetooth
14:11:20 6 implementation. And under the holding -- the Federal Circuit
14:11:25 7 holding in *Phillips* and many other cases that have followed
14:11:28 8 that: The presence of dependent claim that adds a particular
14:11:32 9 limitation gives rise to a presumption that the limitation in
14:11:35 10 question is not present in the independent claim.

14:11:39 11 We think this is clear evidence that the scope of the
14:11:42 12 patent is beyond Bluetooth and relies on Bluetooth spec is not
14:11:49 13 even really extrinsic evidence. It's almost irrelevant
14:11:52 14 evidence.

14:11:54 15 Finally, Bandspeed, relies heavily in their claim
14:12:10 16 construction analysis on the prosecution of the '272
14:12:16 17 application. They describe it as the part of the prosecution
14:12:21 18 history of the patent in dispute. At one point in their
14:12:24 19 briefing they describe it as the parent application. That's
14:12:28 20 false, and it's not intrinsic evidence and it's not part of the
14:12:31 21 prosecution history both as a matter of law and fact.

14:12:35 22 The prosecution history of '272 application is
14:12:40 23 extrinsic evidence. As noted in the Federal Circuit holding of
14:12:47 24 *Goldenberg v. Cytogen*: The related application is only
14:12:49 25 intrinsic evidence as it existed at the time the applicant

14:12:53 1 distinguished one application from the other.

14:12:55 2 And just so it's clear, the '727 application is a
14:12:58 3 separate application that claims priority to the same
14:13:02 4 provisional applications that the patent at issue in this
14:13:05 5 dispute claim priority to. But it was a separate application.

14:13:10 6 I've cited another case, and it's one of others that
14:13:12 7 have looked to *Goldenberg* as evidence that applications even
14:13:18 8 from the same family that are not -- that postdate the issuance
14:13:22 9 of a patent are not extrinsic evidence -- not intrinsic
14:13:26 10 evidence, but are extrinsic evidence.

14:13:28 11 And this is the history of the two patents here, I
14:13:31 12 think pretty clear why this is extrinsic evidence. The patent
14:13:35 13 that's at issue in this case is noted in blue. It was
14:13:39 14 originally filed, and the main portion of the prosecution
14:13:42 15 history, it was between March of 2002 and May of 2004.

14:13:47 16 At the end of that prosecution history, the examiner
14:13:52 17 that was looking at the application that eventually issued is
14:13:55 18 the '247 said that the '733, which was that application,
14:13:59 19 presents a patentably distinct invention from the '727. That's
14:14:05 20 the application that Bandspeed relies on. It's a patentably
14:14:09 21 distinct invention.

14:14:10 22 That was all done during the prosecution history of
14:14:16 23 the patent at issue in this case. The patent issued in
14:14:18 24 September of 2004, and then the application process began for
14:14:22 25 the second patent.

14:14:22 1 All of the extrinsic evidence that Bandspeed cites to
14:14:27 2 is from the period in 2005 and 2006 -- I think predominantly in
14:14:32 3 2006 in this separate application which eventually issued as
14:14:38 4 the '451 patent in June of 2007.

14:14:43 5 Okay. So I cite a case up here which is very
14:14:46 6 important. The case under binding precedent, a patentee is not
14:14:50 7 bound or estopped by a statement made in connection with a
14:14:53 8 later application on which the examiner of the first
14:14:56 9 application could not have relied.

14:14:58 10 As you can see from the time line here, any
14:15:01 11 statements made in the prosecution of the '727 application
14:15:04 12 occurred after the '247 patent issued. And, obviously, the
14:15:08 13 patent examiner of the '247 patent could not have relied on the
14:15:12 14 statements. So it's binding precedent. Those statements
14:15:15 15 cannot be used as a prosecution history estoppel with an
14:15:21 16 exception. And I'd like to call that exception explicitly.

14:15:25 17 There's an exception to the rule that only when a
14:15:27 18 patentee, in prosecuting a related application -- a later
14:15:31 19 application, makes statements as to the scope of the invention
14:15:34 20 claimed in the earlier application. Explicit statements about
14:15:37 21 the scope of the invention and the earlier application. That
14:15:40 22 would be an exception where the Court would want to consider
14:15:42 23 those statements.

14:15:44 24 It tracks closely the general analysis of prosecution
14:15:49 25 history estoppel, which is a patentee can limit claim scope

14:15:54 1 while prosecuting a patent only by using words or expressions
14:15:57 2 of manifest exclusion or restriction representing a clear
14:16:01 3 disavowal of claim scope. And I know the Court is well aware
14:16:04 4 of this precedent. This is not anything new to the Court, but
14:16:07 5 it's very important here. You'll see as we talk about the
14:16:10 6 statements in the prosecution history of this later application
14:16:13 7 that Bandspeed is relying on, they come nowhere near a clear
14:16:17 8 disavowal of claim scope. They're largely irrelevant.

14:16:22 9 All right. So let's get into the terms themselves.
14:16:25 10 The first term is "packet." We heard quite a bit about what a
14:16:28 11 packet is and what it's not. We think that the clearest
14:16:31 12 construction for packet is a signal. And Bandspeed's proposed
14:16:36 13 construction -- and we're on slide 21 now -- is a group of
14:16:41 14 binary digits which is switched, if at all, and transmitted as
14:16:44 15 a composite whole. The term "packet" appears in claims 1, 2,
14:16:49 16 and 20. It's also asserted through corporation in claims 8, 9,
14:16:53 17 and 10, and 25 and 26.

14:16:55 18 So we believe the claims clearly support CSR's
14:16:59 19 construction. Claim one, for instance, talks about receiving a
14:17:04 20 synchronization packet transmitted from a first device;
14:17:08 21 receiving a first data packet transmitted from a first device.
14:17:11 22 The packets are received and transmitted by devices and are
14:17:14 23 transported as carrier signals.

14:17:16 24 And if you'll look at the diagram -- this was from
14:17:19 25 Dr. Akl's presentation -- he described how digital signals,

14:17:24 1 which can represent binary digits, are modulate and prepared
14:17:30 2 for transmission that could be transmissions wirelessly or over
14:17:34 3 a wired line, but the transmissions are done as analog signals,
14:17:39 4 as frequencies. And let me be clear here, and I think Dr. Akl
14:17:44 5 alluded to this, but the idea that you have a packet of
14:17:47 6 information, and that information may be zeros and ones in the
14:17:51 7 portion of this -- of the illustration to the far left.

14:17:53 8 Those might be zeros and ones as it's being passed
14:17:57 9 through the protocol stack of whatever protocol might be
14:18:01 10 implemented in the device. But before it can be transmitted,
14:18:04 11 the information needs to be expressed as a frequency. And this
14:18:08 12 is clear in the claims because you're transmitting it
14:18:13 13 wirelessly as a signal -- a carrier signal between two
14:18:18 14 devices. So those -- the two devices may send packets of
14:18:22 15 information as bursts of signals -- signal bursts that go from
14:18:26 16 one to the next and they carry the information that's included
14:18:29 17 in the packets.

14:18:30 18 THE COURT: So you assert that a packet is a signal?

14:18:37 19 MR. KING: Yes, sir.

14:18:38 20 THE COURT: And Bandspeed asserts that it's a group
14:18:42 21 of binary digits, et cetera. So is your argument that a
14:18:46 22 patent -- I mean, that a packet may contain more than binary
14:18:54 23 digits? Is that what I'm hearing you say?

14:18:56 24 MR. KING: Not quite. The way I understand it is-

14:18:59 25 THE COURT: Well, what's the difference between a

14:19:01 1 signal, as you assert, and a group of binary digits, as
14:19:09 2 Bandspeed asserts?

14:19:10 3 MR. KING: The binary digits are represented in
14:19:14 4 different ways in different parts of the process. The binary
14:19:19 5 digits are represented as, you know, X's and O's as it's
14:19:23 6 running through -- as Mr. DiNovo described in his tutorial, how
14:19:28 7 they can be -- groups of them can be explained as X's and O's
14:19:33 8 as it goes through the protocol stack. That information, those
14:19:36 9 X's and O's, needs to be converted into a different expression
14:19:41 10 for a transmission between two wireless devices. It's
14:19:44 11 transmitted as a frequency, as a frequency transmission.

14:19:50 12 So to the extent the information that's inherit in
14:19:54 13 those X's and O's as it passes through the digital signal --
14:19:59 14 that's a signal as well. As Mr. DiNovo referred to repeatedly,
14:20:04 15 that's a signal as well. But when it's converted into a signal
14:20:07 16 to be transmitted, it's expressed as an analog wave -- as a
14:20:11 17 wave form, as a frequency in transmission.

14:20:14 18 THE COURT: What I'm getting to is: What is the
14:20:16 19 difference between your definition and Mr. DiNovo's definition
14:20:24 20 other than the words? What are you arguing happens -- why is
14:20:32 21 the trier of fact more enlightened by considering a signal than
14:20:37 22 the trier of fact is enlightened by a group of binary digits
14:20:43 23 which is switched, if at all, and transmitted as a composite
14:20:46 24 whole? You're going to have to explain that. Whatever claims
14:20:51 25 construction I assert, both of you are going to be stuck with

14:20:55 1 that and are going to have to explain it to the jury.

14:20:58 2 So what is the difference? In your mind, what
14:21:01 3 difference does it make if I construe the term your way or
14:21:05 4 Bandspeed's way?

14:21:06 5 MR. KING: I'll do my best to answer that question.
14:21:08 6 It's an excellent question and it gets to the heart of it.
14:21:13 7 In -- our construction focuses on the portion of this operation
14:21:19 8 that's relevant to the patent. And what's relevant to the
14:21:23 9 patent, what this method is describing and claiming and
14:21:26 10 focusing on is that process of a device communicating with
14:21:31 11 another device, of looking at the packets that are being sent,
14:21:35 12 the bursts of data, the information, the signal that's
14:21:38 13 coming --

14:21:38 14 THE COURT: Between two towers?

14:21:40 15 MR. KING: Between the two towers. The most relevant
14:21:44 16 one is the receiving tower because it's looking at the time
14:21:47 17 that these things are received and measuring the time between
14:21:49 18 them.

14:21:50 19 THE COURT: Right.

14:21:50 20 MR. KING: So what's relevant for this patent is
14:21:53 21 there are signals being sent. And that's where we want --
14:21:56 22 that's what the patent focuses on, and that's where we want the
14:22:00 23 Court and the jury to focus on, is that it's --

14:22:03 24 THE COURT: Well, tell me what a signal is.

14:22:06 25 MR. KING: A signal is a -- is a transmission of

14:22:12 1 information of a wave form between two devices.

14:22:17 2 THE COURT: All right. And it is not a group of
14:22:19 3 binary digits that runs between the two devices. It is binary
14:22:24 4 digits that have been converted to something else, and then
14:22:27 5 they get reconverted back to binary digits at the modulator?

14:22:32 6 MR. KING: That's right.

14:22:33 7 THE COURT: Is that your argument?

14:22:34 8 MR. KING: That's right. And the reason I think
14:22:36 9 that's important is because what I think Mr. DiNovo and
14:22:39 10 Bandspeed is focusing on is the portion of the communication
14:22:43 11 path that is before the modulator.

14:22:46 12 THE COURT: I don't care what they're focusing on.

14:22:48 13 MR. KING: Okay.

14:22:49 14 THE COURT: It doesn't help -- I'll tell both of you
14:22:53 15 this. It doesn't help very much with me to discredit what the
14:22:56 16 other side wants. I want to know what you want and why you get
14:22:59 17 it. And I'll work that out based on what you say, and I'll
14:23:02 18 work Bandspeed out based on what it says. But you waste a lot
14:23:06 19 of your precious time by telling me why the other side is
14:23:09 20 wrong. I want to know why you're right.

14:23:11 21 MR. KING: Okay.

14:23:11 22 THE COURT: So what I want to know is, does a signal
14:23:17 23 more clearly describe what is happening in the patent than a
14:23:21 24 group of binary digits more clearly describes what's happening
14:23:26 25 in the process in the patent --

14:23:27 1 MR. KING: Absolutely.

14:23:28 2 THE COURT: -- and why. That's what wins for you and
14:23:33 3 might win for Mr. DiNovo when turned around the other way. So
14:23:36 4 what you need to tell me is why a signal is more descriptive of
14:23:41 5 what is happening -- more accurately descriptive of what is
14:23:45 6 happening than the phrase "a group of binary digits,"
14:23:50 7 et cetera.

14:23:51 8 MR. KING: I absolutely think the signal more clearly
14:23:54 9 captures what "packet" means in the context of this patent. As
14:23:59 10 I said, the patent is focusing on the transmission and the
14:24:02 11 reception of blocks of information that are sent as signals.
14:24:09 12 And for purposes of the patent, the packet is a block of
14:24:19 13 information that is a signal. And we think that that simply
14:24:25 14 and directly gets to the heart of what this patent is claiming.

14:24:28 15 THE COURT: Now, is all that is in there are
14:24:33 16 converted binary digits, or are there other things in there in
14:24:38 17 the analog line that goes between the two towers?

14:24:44 18 MR. KING: The patent doesn't say, and I don't think
14:24:46 19 it's relevant necessarily to the patent.

14:24:49 20 THE COURT: No. But I asked you a question. I
14:24:51 21 didn't ask you what's relevant to the patent. I asked you a
14:24:54 22 direct question. What is in there going between the two
14:24:57 23 towers, just binary digits that have been converted or
14:25:01 24 something more than that?

14:25:03 25 MR. KING: And the answer is it depends what the two

14:25:07 1 devices are communicating and what protocol they're using. In
14:25:09 2 a protocol, for instance, Wi-Fi, then it would be an expression
14:25:14 3 of X's and O's in an analog signal. So it would be a binary
14:25:22 4 information that's being transmitted in that packet. In other
14:25:25 5 types of protocols, it's not necessarily so. It could just be
14:25:32 6 a signal without the binary aspect. The information could be
14:25:35 7 transmitted in different ways.

14:25:37 8 And the patent doesn't make any distinction, doesn't
14:25:41 9 make any limitation on the signal being an X and an O or a one
14:25:45 10 and a zero. It only talks about the packet being received and
14:25:49 11 the timing between receipt of packets.

14:25:51 12 THE COURT: All right.

14:25:52 13 MR. KING: I hope that answers your question.

14:25:54 14 THE COURT: Yeah. You can go. Go ahead.

14:25:57 15 MR. KING: So, again, I won't spend too much time on
14:26:03 16 this. But the claim talks about synchronization packets
14:26:08 17 transmitted and looking at a synchronization packet and a first
14:26:13 18 data packet and looking at the time between them and through
14:26:14 19 that identifying device.

14:26:16 20 That's also described in the abstract, and we've gone
14:26:19 21 over this sort of quickly. What the patent is not saying, it
14:26:23 22 says nothing about the physical characteristics of the packet.
14:26:25 23 And this gets to your question, I believe, Your Honor. It
14:26:28 24 doesn't say anything about binary digits. It doesn't say
14:26:32 25 anything about what the packet looks like or how it's

14:26:36 1 structured.

14:26:36 2 THE COURT: And are we going to presume that each one
14:26:48 3 of the jurors knows what a signal is?

14:26:50 4 MR. KING: I think I'm comfortable with that.

14:26:52 5 THE COURT: If I accept your construction and
14:26:58 6 construe it as a signal, are you comfortable that the jury will
14:27:02 7 understand what a signal is?

14:27:03 8 MR. KING: Yes, Your Honor.

14:27:04 9 THE COURT: What do we think they're going to think
14:27:08 10 it is?

14:27:08 11 MR. KING: What do I think that the jury will think
14:27:10 12 they are?

14:27:10 13 THE COURT: Yeah.

14:27:11 14 MR. KING: I think they'll understand that a signal
14:27:13 15 is a transmission of a frequency, of an analog wave and there
14:27:18 16 are different ways to describe it. Basically an analog wave.

14:27:21 17 THE COURT: An electronic wave that moves between the
14:27:24 18 two towers?

14:27:26 19 MR. KING: Yes, Your Honor.

14:27:27 20 THE COURT: All right.

14:27:27 21 MR. KING: And it doesn't say anything about the
14:27:29 22 content of the packet. Now, I know you said you don't want me
14:27:33 23 to attack their constructions.

14:27:35 24 THE COURT: You can do it if you want to. I'm just
14:27:37 25 telling you you generally waste your time doing it. I don't

14:27:40 1 care what you do.

14:27:41 2 MR. KING: Okay. So I will do it very quickly and
14:27:43 3 waste a little bit of time, but not too much.

14:27:45 4 THE COURT: That was just some advice.

14:27:46 5 MR. KING: It's good advice. I wish I'd had the
14:27:47 6 advice before I presented my slides. But I think I'll just do
14:27:50 7 this quickly. The patent says nothing about binary digits. It
14:27:55 8 says nothing about it being switched. In fact, it talks about
14:27:58 9 communications between devices where there is no switching
14:28:00 10 going on. It doesn't say anything about transmitting it as a
14:28:03 11 group or a composite whole.

14:28:05 12 That doesn't -- these constructs don't appear in the
14:28:08 13 patent. So where did they come from? They come from a
14:28:17 14 dictionary definition. And Bandspeed cites to a dictionary
14:28:20 15 from 2000, and the first definition is, "a group of binary
14:28:24 16 digits including data control elements which is switched and
14:28:29 17 transmitted as a composite whole."

14:28:31 18 So that's where the definition came from. The
14:28:32 19 definition goes on to say, "The data and control elements and
14:28:34 20 possibly error control information are arranged in a specified
14:28:36 21 format." They don't include that part of the definition, but
14:28:39 22 that was part of the definition that they cited to.

14:28:42 23 Now, this I think really illustrates effectively the
14:28:48 24 danger of using dictionary definitions. There are 12 different
14:28:52 25 definitions for "packet" in this same reference. And if you

14:28:56 1 look, one describes it as a block of information that's
14:28:59 2 transmitted. One's a collection of symbols, a 17-bit unit of
14:29:04 3 data, a sequence of N_chars, unit of data, a serial stream.

14:29:08 4 All of these things are packets and fairly describe
14:29:11 5 what a packet is in different contexts, but not in the context
14:29:15 6 of transmitting between one wireless device to another. The
14:29:22 7 closest one of these I think, in my humble opinion, that gets
14:29:26 8 to the idea of transmission is number nine, which talks about
14:29:29 9 "a block of information that is transmitted within a single
14:29:31 10 transfer operation."

14:29:32 11 That I think describes what we have in mind as a
14:29:35 12 signal, because the signal is a block of information that's
14:29:38 13 being transmitted between two devices.

14:29:42 14 I'll talk briefly about the prosecution history that
14:29:44 15 they rely on.

14:29:46 16 Now, what they've done here -- this is interesting.
14:29:51 17 I think the citation of the prosecution history that Bandspeed
14:29:55 18 relies on actually proves our point. They point to the portion
14:29:59 19 of the claim from this separate application that I underlined
14:30:05 20 in red. And it basically says, receiving a signal;
14:30:09 21 generating a data packet corresponding to the signal.

14:30:12 22 And the examiner in this later application said,
14:30:15 23 well, in looking at the specification, I don't see any
14:30:19 24 description of receiving a signal and generating a packet from
14:30:22 25 the signal. So the patent -- the patentees just took it out.

14:30:27 1 They just crossed it out and left it -- they realized it wasn't
14:30:32 2 necessary to their claim, so they just took it out.

14:30:35 3 Well, what was necessary to their claim? They talk
14:30:37 4 about a synchronization packet transmitted wirelessly at a
14:30:41 5 radio frequency. They talk about transmitting the first data
14:30:45 6 packet at a radio frequency. What they're talking about in
14:30:49 7 that patent is sending information, sending packets as signals
14:30:53 8 between two wireless devices.

14:30:55 9 Now, in that context, of course they drop the
14:30:58 10 language that the examiner pointed to because it makes no sense
14:31:01 11 to receive a signal and generate a data packet corresponding to
14:31:06 12 the signal when the data packet is a signal. So they drop it,
14:31:09 13 and it certainly does not represent a clear disavowal of claim
14:31:13 14 scope. If anything, I think this clearly illustrates that the
14:31:16 15 patentees understood that, at least in this later application,
14:31:20 16 that a packet -- the synchronization packet, the first data
14:31:26 17 packet, was a frequency. It was a radio frequency. It was a
14:31:30 18 signal.

14:31:31 19 The next term we'd like to go to, with the Court's
14:31:34 20 permission, is "synchronization packet." It appears in claim
14:31:38 21 1, 2, and 20 and, through incorporation, in asserted claims 8,
14:31:44 22 9, 10, 25, and 26.

14:31:46 23 Our construction is, a signal used to mark the start
14:31:50 24 of a, or the, time period. It's either "a" and "the,"
14:31:56 25 depending on where in the claims it's incorporated.

14:31:59 1 Bandspeed's proposal is a discreet packet
14:32:03 2 specifically designated to contain only synchronization data.
14:32:08 3 We believe that our construction is well supported by
14:32:10 4 the claim. If you look at claim one, it talks about receiving
14:32:13 5 a synchronization packet. I'll do this quickly, because I know
14:32:16 6 that we've gone over this both with the experts and I've
14:32:17 7 touched on this before. But first you receive a
14:32:22 8 synchronization packet. And what does a synchronization packet
14:32:25 9 do? It synchronizes your watches, let's start the time period,
14:32:30 10 because we're going to look for the data packets to come next.
14:32:31 11 And then we're going to measure an offset based on those
14:32:33 12 findings.

14:32:33 13 THE COURT: What is in the synchronization packet?
14:32:42 14 Is it just a bit of energy which does no more than trigger a
14:32:47 15 clock, or does it tell the receiver something more and give the
14:32:53 16 receiver more information than just wake up and listen for
14:32:57 17 what's going to come next?

14:32:59 18 MR. KING: It starts the clock and nothing more.
14:33:02 19 That's the difference between a synchronization packet and a
14:33:06 20 data packet.

14:33:07 21 THE COURT: So then there is no synchronization data
14:33:10 22 in the synchronization packet?

14:33:12 23 MR. KING: Not necessarily. There's no need for it.
14:33:16 24 And if I can explain for a minute, I think I can explain why
14:33:19 25 that is in the context of the patent.

14:33:21 1 If you look at -- unfortunately, I don't have a slide
14:33:25 2 for this because I didn't know you were going to ask this
14:33:25 3 question.

14:33:26 4 THE COURT: Of course you don't. That's why this job
14:33:28 5 is fun.

14:33:30 6 MR. KING: Exactly. So if you look at figure 4 and
14:33:32 7 you compare it to column 4 on lines 28 through 29, it talks
14:33:37 8 about the proprietary protocol that's used to perform the
14:33:45 9 operation of the method. And that proprietary protocol is not
14:33:53 10 Bluetooth. It's not Wi-Fi. It's not any number of other
14:33:56 11 protocols. It's a proprietary protocol that you're using to
14:33:59 12 identify -- to work this operation.

14:34:01 13 Now, in different systems, in different protocols,
14:34:06 14 synchronization information data, synchronization data that you
14:34:10 15 might think of as synchronization data takes many different
14:34:15 16 forms. In Bluetooth it might be a particular bit of
14:34:19 17 information that's sent in -- at a different time than other
14:34:22 18 information. In cellular technologies, it's basically
14:34:27 19 information sent on a different frequency.

14:34:30 20 THE COURT: But what does it do? Dr. Akl said that
14:34:39 21 what we have and what we're looking at in this process is the
14:34:42 22 amount of the offset to let the receiver know whether it's
14:34:49 23 coming from a cell phone or coming from a radar unit or coming
14:34:53 24 from a baby monitor or any of the -- or a Bluetooth device.

14:34:57 25 So if that is true, and if the key element that let's

14:35:07 1 the receiver know what it's getting is going to be the offset,
14:35:12 2 then why is there ever any other synchronization data than just
14:35:17 3 the ping to wake up the receiver and then the clock starts and
14:35:20 4 it counts the offset, and then when it starts receiving more
14:35:25 5 data, it knows where it's coming from?

14:35:28 6 MR. KING: I think --

14:35:29 7 THE COURT: What more goes on between the time the
14:35:32 8 clock is started and the data packet arrives?

14:35:35 9 MR. KING: That's what goes on. That's what the
14:35:38 10 patent describes. That's -- that is the essence of the
14:35:42 11 invention as described in the abstract, the claims, the
14:35:45 12 specification. It's not protocol specific. And the nature of
14:35:53 13 synchronization data is very different in different protocols,
14:35:57 14 and this patent doesn't touch any of that.

14:35:59 15 THE COURT: Yeah. But you haven't explained to me
14:36:00 16 what the synchronization data is. That's what I keep trying to
14:36:01 17 get to.

14:36:01 18 MR. KING: And I'm saying there isn't any.

14:36:03 19 THE COURT: Okay. Then how can it be -- if there's
14:36:06 20 not any, how can it be very different in various protocols?
14:36:09 21 Because It sounds to me like what you're telling me -- and I'm
14:36:12 22 a layman and everybody on the jury is going to be a layman
14:36:15 23 unless we work out a way to only send notices to electrical
14:36:18 24 engineers that live in Austin. We've got enough of them. We
14:36:22 25 could get a jury of electrical engineers in Austin. But you're

14:36:26 1 likely to get laypeople.

14:36:28 2 MR. KING: Yes, sir.

14:36:28 3 THE COURT: So what they're going to think -- and the
14:36:31 4 reason I ask these questions is to get you off of your
14:36:33 5 technical knowledge and into how you're going to try this case.

14:36:37 6 MR. KING: I understand.

14:36:38 7 THE COURT: That what a juror is likely to think is,
14:36:41 8 and the way they think is it's like an electrical spark or a
14:36:45 9 little bleep or something. It's a noise or an electrical
14:36:54 10 charge or something that clicks that clock on, and then the
14:36:56 11 clock counts. And then when it gets to the next indication,
14:37:02 12 then it knows what it's getting it from.

14:37:05 13 So it's going to be difficult for them to understand
14:37:07 14 when you say there are all kind of synchronization data if it
14:37:11 15 doesn't really matter what the synchronization data is and all
14:37:16 16 you're looking for here is something that starts the clock.

14:37:19 17 MR. KING: I understand. And let me try and --

14:37:19 18 THE COURT: It will go easier at trial if you thought
14:37:21 19 through this before you get to trial.

14:37:23 20 MR. KING: I have thought through this, and I think I
14:37:26 21 can explain that. The synchronization packet -- the purpose of
14:37:29 22 the synchronization packet in this patent -- and I shouldn't
14:37:32 23 set myself up for failure. Maybe there's a better way to
14:37:35 24 explain it. But I think the best analogy is you synchronize
14:37:40 25 your watch. I receive that packet. I say, Okay. I've got a

14:37:43 1 point. I'm going to synchronize my watch now and I'm going to
14:37:46 2 listen carefully for that next data packet. This is described
14:37:49 3 in the specifications. I'm going to listen. When it comes in,
14:37:51 4 I'm going to go okay. That was X amount of time. And based on
14:37:54 5 that, I can identify the device.

14:37:57 6 That's what the patent describes. It describes it
14:38:00 7 throughout the specifications. It describes it clearly in the
14:38:03 8 claims. It doesn't say anything about what that
14:38:06 9 synchronization packet is other than start (snaps fingers).
14:38:09 10 Start the clock. And when does it -- when you get that first
14:38:12 11 data packet or the second data packet in certain
14:38:15 12 implementations, you stop the clock. And that's the whole
14:38:18 13 function of the patent. That's what the patent is. It's the
14:38:20 14 heart and soul of this patent. It's very simple.

14:38:30 15 Does that answer your question, sir?

14:38:31 16 THE COURT: No. Well, other than the fact I want to
14:38:34 17 make sure I've read the charts correctly, the clock goes on at
14:38:36 18 the beginning of the synchronization packet but doesn't go off
14:38:45 19 until it gets the end of the data packet, or does it go off at
14:38:48 20 the beginning of the data packet?

14:38:50 21 MR. KING: Well, I think the patent talks about
14:38:52 22 the -- that's getting to the heart of the construction, I
14:38:55 23 think, of the offset. What is the offset?

14:38:57 24 THE COURT: Yeah. I just asked this question because
14:38:59 25 I'd seen it, and I thought it was a good place to ask the

14:39:03 1 question of how long does the clock stay on, because we were
14:39:05 2 talking about the clock.

14:39:06 3 MR. KING: Yeah. I think the -- the diagram in
14:39:09 4 figure 4 here seems to suggest that you're starting from the
14:39:15 5 arrival, the beginning, the front end of the signal from the
14:39:17 6 synchronization packet and you measure to the front end -- I'm
14:39:20 7 sorry.

14:39:20 8 THE COURT: The question is not that hard. Has the
14:39:22 9 receiving device gotten all of the information before it
14:39:28 10 determines that the data came from a portable phone? Or does
14:39:41 11 it determine based on the time lapse that the data came from
14:39:44 12 the portable phone before it receives all the data?

14:39:48 13 MR. KING: It's determined based on the time lapse.

14:39:50 14 THE COURT: The time lapse from when to when? From
14:39:51 15 the time it gets the synchronization packet to the time the
14:39:55 16 data packet begins or the time the data packet ends.

14:39:59 17 MR. KING: I understand it to be from the time the
14:40:02 18 data packet begins.

14:40:03 19 THE COURT: Okay.

14:40:04 20 MR. KING: From the beginning to the beginning.

14:40:06 21 THE COURT: Okay.

14:40:13 22 MR. KING: Although I'm sure there are
14:40:14 23 implementations where you can -- if you knew how long the data
14:40:15 24 packet was, you could measure the time between the end of the
14:40:15 25 data packet -- of the synchronization packet and the beginning

14:40:19 1 of the data packet and you'd still be able to calculate an
14:40:22 2 offset because you'd know how long the data packet -- the
14:40:25 3 synchronization packet was.

14:40:26 4 THE COURT: Dr. Akl knows all this, I think.

14:40:29 5 MR. KING: He certainly does.

14:40:29 6 THE COURT: He can tell you.

14:40:29 7 MR. KING: He'll have an opportunity to explain it
14:40:31 8 better than I can.

14:40:32 9 Okay. So the specification also supports it. I
14:40:36 10 won't go over this it just basically tracks the same language
14:40:40 11 of the claim. And, again, the specification talks about
14:40:43 12 receiving a device -- receiving device uses the offset between
14:40:47 13 the synchronization packet and data packet to identify the
14:40:51 14 wireless device which transmitted the data packet. That's the
14:40:52 15 heart of the invention.

14:40:53 16 The only distinction the '247 patent makes between
14:40:57 17 the data packet and the synchronization packet is that one
14:41:00 18 follows the other. And you won't find -- at least I haven't
14:41:04 19 been able to find anything in the specification that says
14:41:07 20 otherwise.

14:41:07 21 So Bandspeed's construction has a couple of problems
14:41:10 22 with it that I just want to point out quickly. I think one of
14:41:13 23 the most important ones is they talk about the synchronization
14:41:17 24 packet being a discreet packet specifically designated to
14:41:21 25 contain only synchronization data. I'm sure the Court's aware

14:41:26 1 of the problem with introducing a new element that requires the
14:41:29 2 action of somebody out -- somebody else.

14:41:32 3 Who is specifically designating this? Is it the
14:41:36 4 method? It the devices? Is it some engineer who is
14:41:40 5 implementing the devices? It creates numerous problems. One
14:41:44 6 of the main ones is one of these claims is an apparatus claim.
14:41:49 7 And what this is it's introducing a method step into an
14:41:53 8 apparatus claim which would invalidate the patent. And under
14:41:58 9 *IPXL*, which we've cited in our brief and I'm sure the Court's
14:42:00 10 familiar with it, that the courts should avoid trying to
14:42:05 11 introduce additional elements into a claim term that
14:42:09 12 invalidates the patent. There's no reason to have this
14:42:12 13 specifically designated portion limitation.

14:42:15 14 They also add that it only contains synchronization
14:42:20 15 data. That's not described anywhere in the patent, and it gets
14:42:24 16 to what we're talking about before. The synchronization data,
14:42:27 17 it's not clear what that is because it's a different thing with
14:42:29 18 different protocols and it just adds ambiguity and confusion to
14:42:34 19 the claim.

14:42:35 20 And, finally, it's circular. You're defining a
14:42:38 21 synchronization packet as a synchronization packet.

14:42:41 22 Let me talk again briefly about their reliance on the
14:42:44 23 prosecution history of the '727. In the prosecution history,
14:42:53 24 there's a reference called *Robillard* which the patent examiner
14:42:58 25 has cited to the patentees in this later application. And the

14:43:02 1 reference in *Robillard* sent timing beacons and -- they sent
14:43:10 2 them out, and the patentees basically argue that *Robillard*
14:43:16 3 fails to teach or suggest or disclose a synchronization packet
14:43:19 4 usable to synchronize data transmissions. The patentee said
14:43:24 5 these timing beacons were not synchronization packets.

14:43:28 6 What Bandspeed argues is that the timing beacons are
14:43:32 7 signals. I agree with that. The timing beacons are not
14:43:35 8 synchronization packets. I'm not sure that it's fair to read
14:43:39 9 this statement to the PTO for that proposition, but I'll give
14:43:43 10 it to them for purposes of argument. And they say, therefore,
14:43:47 11 synchronization packets are not signals.

14:43:49 12 This is a just a pure logical false syllogism, and I
14:43:54 13 think it's easy to illustrate. Timing beacons are signals. We
14:43:58 14 agree on that. Timing beacons are not synchronization
14:44:02 15 packets. We agree on that. Synchronization packets are not
14:44:05 16 signals. Well, that does not make any sense. They can
14:44:08 17 absolutely be signals, and I think that just illustrates it.

14:44:12 18 And what we've done here, you'll see the purple and
14:44:15 19 the blue. The later application was talking about the meaning
14:44:19 20 of synchronization packets usable to the synchronize data
14:44:24 21 transmissions in the context of the '727 patent, which I think
14:44:28 22 is something very, very different than the synchronization
14:44:29 23 packets as stand-alone term as used in the '247 patent.

14:44:33 24 But, really, it's beside the point, because even if
14:44:34 25 they meant the same thing, this illustration, this Venn diagram

14:44:38 1 shows that their syllogism is just baseless and it certainly is
14:44:40 2 not a clear disavowal of claim scope.

14:44:43 3 "[First] data packet." This is an example -- we
14:44:49 4 propose that first data packet is a signal used to transport
14:44:52 5 information. They describe it as a discreet packet
14:44:55 6 specifically designated to contain only non-synchronization
14:44:58 7 data next follow the synchronization packet.

14:45:02 8 We -- I think this is an example where we did rely on
14:45:08 9 dictionary definitions because we thought that there were some
14:45:11 10 good definitions for "data" that made it clear that they're
14:45:13 11 talking about information. And we agree that the first data
14:45:16 12 packet does have information in it. We cite in our brief, our
14:45:20 13 opening brief, in Exhibit B to page 4 to a definition that we
14:45:24 14 think reflects the general idea that data is information.

14:45:29 15 THE COURT: Both of you believe that that term
14:45:32 16 requires construction? You don't think the trier of fact would
14:45:41 17 just know that what the first data packet was. And if it was a
14:45:45 18 data packet, it was different from synchronization packet and
14:45:50 19 it was the first data received after the synchronization
14:45:53 20 packet?

14:45:54 21 MR. KING: I think that -- if the Court decided not
14:45:56 22 to construe this term and gave it its plain and ordinary
14:46:01 23 meaning, I would be fine with that.

14:46:09 24 What Bandspeed has proposed is -- again, the
14:46:10 25 "specifically designated," that get to the various problems

14:46:13 1 that I discussed earlier about adding unwritten steps and
14:46:17 2 introducing method steps into apparatus claims. They also add
14:46:22 3 the unsupported limitation that it contains only
14:46:26 4 non-synchronization data.

14:46:27 5 I want to just take a quick second for this because
14:46:29 6 there's -- as Mr. DiNovo was giving his presentation on the
14:46:33 7 technology, something struck me I hadn't thought of before.
14:46:36 8 They say the synchronization packet is a packet that has only
14:46:40 9 synchronization data, and they say that a data packet contains
14:46:44 10 only non-synchronization data. But throughout all kinds of
14:46:49 11 wireless protocols, there are packets that include both
14:46:53 12 synchronization data as might be construed by somebody who's
14:46:57 13 familiar with the protocol and non-synchronization data in a
14:47:01 14 packet.

14:47:02 15 A good example is in modem technology, when you send
14:47:06 16 a signal -- pulse over of the modem, then there's information
14:47:10 17 in that packet that includes synchronization information. And
14:47:14 18 part of that same packet is information about the information
14:47:16 19 we transmitted. So is that packet a data packet? No. Because
14:47:21 20 it has synchronization data. Is it a synchronization packet?
14:47:25 21 No. Because it has non-synchronization data. I mean, they --
14:47:29 22 there's just so much ambiguity introduced by this, kind of,
14:47:33 23 rigid, it's got to be X or Y.

14:47:36 24 The third unsupported limitation they add is next
14:47:39 25 following. I think this is worth a second to talk about as

14:47:43 1 well. The specification talks about in one example the data
14:47:48 2 packets 422 and 423 may originate from the same wireless
14:47:52 3 device.

14:47:53 4 Now, if you look at figure 4, you can see that you're
14:47:56 5 able to measure two offsets from these two data packets being
14:48:00 6 sent from the same device, one data packet following the
14:48:03 7 other. So the idea that data packet 423 has to be the next
14:48:08 8 following the synchronization packet is -- it would exclude
14:48:15 9 this embodiment. So I don't think it would be -- under
14:48:18 10 construction tenets, you don't introduce an unnecessary
14:48:24 11 limitation that excludes an embodiment.

14:48:27 12 The next proposed construction is "periodically." It
14:48:32 13 appears only in claim two.

14:48:33 14 THE COURT: Well, no. Back up a minute. Tell me why
14:48:37 15 it wouldn't be the next packet following the synchronization
14:48:44 16 packet. If what the synchronization packet does is start the
14:48:47 17 clock and the clock counts, are you saying that there could be
14:48:51 18 something unrelated come in in the middle? It wouldn't be the
14:48:56 19 next packet of information?

14:48:57 20 MR. KING: What the specification is describing is
14:49:01 21 data packet 422 and 423 may originate from the same wireless
14:49:06 22 device, and the offsets 432 and 434 respectively may identify a
14:49:12 23 characteristic of the data being transmitted. So it's an
14:49:15 24 embodiment that says you basically have two clocks where the
14:49:19 25 synchronization packet occurs and you measure, and when the

14:49:22 1 first data packet comes in, you stop the clock, when the second
14:49:25 2 data packet comes in you stop the clock. And then you say,
14:49:29 3 okay. Based on the different offsets, the first packet has
14:49:31 4 priority over the second.

14:49:33 5 That's only an embodiment that's described in the
14:49:37 6 patent and it's not in claim one. I don't see this described
14:49:40 7 in claim one. But it explains why the first data packet or the
14:49:44 8 data packet can't be the next following.

14:49:48 9 Proposed construction for "periodically" appears only
14:49:52 10 in claim two, and both parties rely on dictionary definitions
14:49:59 11 for this term. You'll see Bandspeed picked dictionary
14:50:03 12 definition from Webster's dictionary which comes from -- the
14:50:11 13 citation they put in their papers, it says last visited
14:50:18 14 7/13/2005.

14:50:18 15 THE COURT: The difference between the two of you is
14:50:20 16 the word "irregular"?

14:50:22 17 MR. KING: Absolutely. That's all.

14:50:24 18 THE COURT: So why -- so don't worry about the
14:50:28 19 dictionaries. Tell me why adding "irregular" makes it the
14:50:31 20 construction I should follow instead of just using "regular"
14:50:35 21 which is the construction urged by Bandspeed. You word it
14:50:39 22 slightly differently, but that's the difference.

14:50:41 23 MR. KING: Well, I'll tell you. I think reading the
14:50:44 24 patent -- I'll be candid with the Court. Reading the
14:50:48 25 specification and the claims, I don't think the specification

14:50:51 1 or the claims makes clear whether the "periodically" as used in
14:50:58 2 claim two is limited only to regular events or if it includes
14:51:04 3 irregular. We think that -- that based on that, it would be
14:51:10 4 unjustified to pick the narrower construction.

14:51:13 5 THE COURT: I thought, again, let's back up to
14:51:16 6 Dr. Akl. I thought there was a need for there to be regularity
14:51:21 7 in order that the machine could check the list to find out what
14:51:29 8 it was getting from. Now, if it's irregular, how do it know?

14:51:34 9 MR. KING: That's an excellent question, and I do
14:51:36 10 have a slide for that. Going through these definitions, you
14:51:40 11 can just see that some are regular and irregular. But let's
14:51:44 12 talk about the reliance on the prosecution history, because
14:51:46 13 this gets to the core of that particular question.

14:51:48 14 They cite to this language in the prosecution
14:51:52 15 history. And basically what they say is that there's a
14:51:56 16 predetermined offset, and the predetermined offset requires
14:52:02 17 that there be a fixed interval that you're looking at and that
14:52:07 18 the -- that "periodic" needs to have a defined timing.

14:52:13 19 I don't disagree with that. Because when you're
14:52:16 20 looking at offsets, if you're going to do what Dr. Akl
14:52:19 21 described, looking at a table and trying to say, I've got an
14:52:23 22 offset between sync and data packet and I'm going to compare it
14:52:28 23 to the time in my tables and from that I'm going to figure out
14:52:31 24 what device it is, you need to have a very precise, fixed
14:52:34 25 offset -- a predetermined offset as described here.

14:52:38 1 So what they cite to supports that position and I
14:52:41 2 think gets to the question Your Honor asked. But claim two
14:52:46 3 where "periodically" appears has nothing to do with offsets.
14:52:50 4 It talks about the method of claim one further comprising
14:52:53 5 listening for said synchronization packet periodically within a
14:52:58 6 predetermined window of time.

14:53:00 7 THE COURT: Where --

14:53:01 8 MR. KING: It has nothing to do with offsets.

14:53:04 9 THE COURT: Is that the only context in which
14:53:06 10 "periodically" occurs in the patent?

14:53:08 11 MR. KING: "Periodically" is also cited in the
14:53:11 12 specification talking about synchronization packets being sent
14:53:15 13 periodically. And in that context it's described-in the
14:53:19 14 paragraphs which describe, they talk about it's -- at least in
14:53:24 15 my view, it's not clear whether "periodically" is describing
14:53:29 16 synchronization packets being set at specific intervals or
14:53:33 17 whether the synchronization packet can be sent when I reach to
14:53:36 18 hit my keyboard after sitting for a month. That
14:53:39 19 synchronization packet, is that a periodic synchronization
14:53:43 20 signal? I think it is. The patent also talks about periodic
14:53:44 21 synchronization signals being sent every set period of time.

14:53:46 22 THE COURT: So in the application of the patent,
14:53:48 23 again, what difference does it make if it's regular intervals
14:53:55 24 or it's regular or irregular intervals?

14:53:58 25 MR. KING: For the --

14:54:00 1 THE COURT: What do you mean by irregular intervals,
14:54:02 2 since that's what you want?

14:54:03 3 MR. KING: I think what I mean by that is probably
14:54:07 4 best expressed here. We think that the idea of having a
14:54:12 5 keyboard sitting there waiting for somebody to hit the keyboard
14:54:16 6 to send the synchronization signal captures what we've
14:54:22 7 highlighted here in orange, and that's at slide 61. Occurring
14:54:26 8 repeatedly from time to time; reoccurring, intermittent, like a
14:54:33 9 drinking spree. There's a time when I'm going to hit my
14:54:37 10 keyboard and I'm going to send a sync signal to the receiver.
14:54:42 11 And that's not going to be at a set time. It's going to be
14:54:45 12 when I reach over and hit my keyboard.

14:54:47 13 I think the patent envisions synchronization signals
14:54:51 14 being sent in that way. As I said, and I think it's worth
14:54:55 15 emphasizing, that claim one is not talking about sending
14:54:57 16 synchronization packets. It's talking about listening for
14:55:00 17 them, which is a different thing. But I still think the term
14:55:00 18 means the same thing throughout the patent, so it should mean
14:55:03 19 both regular and irregular intervals.

14:55:05 20 Okay. "Timing offsets" and "offset." I don't want
14:55:13 21 to speak for Mr. DiNovo, but in my view --

14:55:15 22 THE COURT: Oh, don't worry. He'll correct you.

14:55:18 23 MR. KING: Maybe he won't. Maybe I'm right about
14:55:21 24 this one. But in my view, I don't think there's really much of
14:55:24 25 a difference in what we understand "offset" or "timing offset"

14:55:32 1 to be. It's the period between two signals as described
14:55:37 2 throughout the patent and the claims and the specifications.

14:55:41 3 We characterize that offset as a delay between the
14:55:45 4 signals, and they've taken issue with that. They have come up
14:55:50 5 with a construction that we take issue with, because I think
14:55:54 6 it's unnecessarily complex and very convoluted and only adds a
14:55:59 7 tremendous amount of ambiguity to the claims.

14:56:02 8 Just for clarity, these terms appear at claims 1 and
14:56:07 9 20, and they also appear through incorporation of claims 2, 8,
14:56:10 10 9, 10, 25, and 26. So we think our construction is the correct
14:56:20 11 construction. Again, we've been over this, so I won't spend a
14:56:24 12 lot of time with it. The patent and its specifications and its
14:56:25 13 claims and its figures talks about receiving data packet -- I'm
14:56:27 14 sorry -- receiving a synchronization packet, receiving a data
14:56:31 15 packet, calculating an offset, and using the offset -- the
14:56:35 16 difference between those in time between those two devices to
14:56:43 17 identity the device.

14:56:44 18 Here's a number of places in slide 70 that show how
14:56:47 19 this is described in various ways throughout the specification,
14:56:51 20 always talking about an offset between a synchronization packet
14:56:55 21 and a data packet in time.

14:56:56 22 Their construction, I think one of the flaws in their
14:57:00 23 construction is that it begins with a measurement immune to
14:57:04 24 time. And I think that's redundant and unnecessary because the
14:57:07 25 claim itself talks about the offset being measured from the

14:57:11 1 synchronization packet by a first amount of time. So you're
14:57:15 2 introducing the notion of a measurement of time when the claim
14:57:18 3 inherent in the language of the claim is this measurement of
14:57:21 4 first amount of time. So I think that the -- that just is an
14:57:25 5 example of how the definition adds a level of redundancy that I
14:57:32 6 think is very confusing and unnecessary.

14:57:36 7 It also lacks clarity, and this gets to Your Honor's
14:57:40 8 question earlier. It talks about measurement of units of time,
14:57:44 9 the difference between the initial time of the receipt. That
14:57:48 10 looks like what they're looking at there is something akin to
14:57:51 11 what's described in offset 432. But it also talks about the
14:57:55 12 initial time of receipt between packets. And "between packets"
14:57:59 13 could be understood by a juror or by the Court or by anyone as
14:58:03 14 being the end of the synchronization packet and the beginning
14:58:07 15 of the data packet. I think inherent in that definition are
14:58:10 16 those two conflicting ideas which I think is really unnecessary
14:58:15 17 for understanding the claim.

14:58:17 18 So claim construction, as the Court well knows and we
14:58:22 19 cited here examples of this and should make the claim easier
14:58:26 20 for the jury to understand. I think just to illustrate the,
14:58:29 21 kind of, fundamental flaws of Bandspeed's constructions, this
14:58:32 22 is what the claim looks like, replacing all the terms that
14:58:36 23 they've asked to be construed with their constructions.
14:58:39 24 They've basically completely rewritten the claim, and it's
14:58:42 25 incomprehensible in our view. And I think that we feel that

14:58:45 1 this isn't going to further the purposes of claim
14:58:48 2 construction.

14:58:49 3 Not to disparage Bandspeed -- I think they have good
14:58:54 4 reasons for all their constructions, I'm sure, as Mr. DiNovo
14:58:57 5 will explain to us, but I think the net result is this, which I
14:59:00 6 don't think is helpful.

14:59:01 7 The last term that I'll touch on is the "host
14:59:04 8 processor environment." It appears at claim 25, which is a
14:59:13 9 dependent claim -- dependent on claim 20. Our definition is, a
14:59:18 10 general purpose processor running an operating system. Their
14:59:21 11 definition is a general purpose computer to which the wireless
14:59:24 12 apparatus can interface as a peripheral. I'll start with our
14:59:30 13 construction.

14:59:31 14 What we did, we came up with this. We basically
14:59:34 15 found in the specification where it describes the host
14:59:37 16 processor environment at column 3, lines 62 through 66. And it
14:59:42 17 describes it as e.g., a general purpose processor such as
14:59:47 18 Pentium class processor, running an operating system such as
14:59:52 19 Windows NT.

14:59:53 20 THE COURT: All right. What do you perceive the
14:59:54 21 difference between a processor and a computer could be?

14:59:58 22 MR. KING: I think there's a huge difference. And
15:00:00 23 that's --

15:00:00 24 THE COURT: Is a processor less or more than a
15:00:03 25 computer?

15:00:03 1 MR. KING: This is a computer. This device here is a
15:00:07 2 computer (indicating). In there is a processor. There are
15:00:10 3 multiple processors, actually, in this computer. And
15:00:13 4 there's -- there's probably a graphics processor. There's
15:00:16 5 probably an arithmetic logic unit in there that's a different
15:00:22 6 kind of processor. There's probably half a dozen different
15:00:25 7 processors in this computer. And calling it a computer versus
15:00:29 8 processor adds a lot -- many layers of ambiguity and confusion,
15:00:36 9 I think. So we tried to tie our proposed construction
15:00:38 10 carefully to the specification, and this is what we came up and
15:00:41 11 we think it fairly describes what the patent describes.

15:00:44 12 They enter this, first, an unnecessary limitation
15:00:48 13 because they start by saying, The wireless apparatus can
15:00:52 14 interface. And, again, the wireless apparatus that they're
15:00:56 15 talking about here is the apparatus claimed in claim 20.

15:01:01 16 And, unfortunately, I didn't put the image up here,
15:01:04 17 but I think it might be helpful if the Court had figure 3 from
15:01:08 18 the patent in front of him because it describes some of this
15:01:12 19 stuff that would make it easy to understand.

15:01:14 20 The host processor environment interfaces with the
15:01:17 21 wireless apparatus as claimed in claim 25. And under tenets of
15:01:25 22 construction, there's no reason to add a limitation that
15:01:29 23 already exists. The claim itself requires that the host
15:01:33 24 processor environment interface with the apparatus, so why
15:01:38 25 introduce "the wireless apparatus can interface" in the claim

15:01:42 1 itself? You're just adding redundancy that adds to the
15:01:46 2 confusion and increases the opportunities for the jury to
15:01:50 3 misunderstand the claim.

15:01:53 4 They also talk about the computer, which is the host
15:01:57 5 interface environment in their construction interfacing as a
15:02:01 6 peripheral. Now, again, if you look at figure 3, you'll see
15:02:05 7 that the -- the host processor environment interfaces with the
15:02:12 8 apparatus as described here. And that's the -- the
15:02:16 9 construction. Now, if you look at -- I'm sorry. This is a
15:02:20 10 slide that Mr. DiNovo presented in his technical tutorial. His
15:02:25 11 slide of the technical tutorial, his slide 11, shows figure 3
15:02:31 12 and they put box around certain things. And they put some
15:02:34 13 boxes around what I think Mr. DiNovo, at least based on their
15:02:39 14 arguments in their brief, were pointing to as peripherals.
15:02:44 15 Those are devices that are connected wirelessly to the
15:02:49 16 apparatus.

15:02:50 17 The host processor environment connects to an
15:02:53 18 interface of the apparatus and then these peripherals are out
15:02:54 19 here. But this seems to suggest that the apparatus -- that the
15:02:57 20 computer is interfacing with the apparatus as a peripheral. It
15:03:04 21 didn't make any sense. And beyond that, "peripheral" is a very
15:03:09 22 ambiguous term which probably requires construction itself.

15:03:12 23 And, lastly, it gets to the Court's question, a
15:03:15 24 general purpose computer. I apologize about the color of
15:03:20 25 that. It didn't come out very well. But a general purpose

15:03:21 1 computer is not a processor. And to try and interpret this in
15:03:28 2 terms of a computer versus a processor has a great deal of
15:03:31 3 confusion, I think, for the jury.

15:03:33 4 So, once again, in summary, these are the seven terms
15:03:36 5 that we propose for construction. These are the constructions
15:03:39 6 we propose, and we respectfully request that the Court adopt
15:03:43 7 the construction we propose. And thank you for your time.

15:03:46 8 THE COURT: Thank you.

15:03:47 9 Mr. DiNovo do you need just a minute to set up?

15:03:51 10 MR. DINOVO: Only if you do, Your Honor.

15:03:57 11 THE COURT: We'll take about five minutes and let you
15:04:00 12 discuss what hardware you're going to use. And let you get
15:04:03 13 organized whatever you want to organize.

15:04:06 14 (Recess)

15:17:31 15 THE COURT: Mr. DiNovo, you shouldn't need more than
15:17:34 16 about two minutes to tell me, "It just isn't so." Have I
15:17:38 17 summed up your argument --

15:17:39 18 MR. DINOVO: You have, Your Honor.

15:17:41 19 THE COURT: -- adequately?

15:17:42 20 MR. DINOVO: We deny everything.

15:17:43 21 To join the issues in the case -- and I know it's
15:17:48 22 Friday afternoon, and the Court and probably everyone in the
15:17:52 23 courtroom is interested in expediting our argument. We thought
15:17:56 24 it would be useful to refer to CSR's slides, which I think the
15:17:59 25 Court has before it?

15:18:01 1 THE COURT: I do.

15:18:02 2 MR. DINOVO: So first of all, there is a general
15:18:10 3 characterization of a lot of our evidence as extrinsic
15:18:14 4 evidence. And two of the categories of that evidence that were
15:18:17 5 so characterized are the Bluetooth specification and the
15:18:20 6 prosecution history of the application to which we direct the
15:18:25 7 Court's attention. With respect to the Bluetooth
15:18:27 8 specification, I would point out to the Court in the '247
15:18:31 9 patent the very detailed reference to the Bluetooth
15:18:33 10 specification in column 1 and background of the invention.

15:18:36 11 And, in fact, it even calls out a particular
15:18:40 12 Bluetooth protocol architecture document as part of the
15:18:43 13 background of the invention. It refers specifically to the
15:18:46 14 Bluetooth specification, multiple communication layers in that
15:18:50 15 specification, and the final statement for what is needed in
15:18:54 16 terms of this invention is a system and method which will work
15:18:58 17 seamlessly with the Bluetooth protocol.

15:19:01 18 Now, that having been said, we do not contend that
15:19:04 19 this -- the patent claims are limited to Bluetooth. But what
15:19:09 20 we do contend is that the specification refers to the -- the
15:19:13 21 specification of the '247 patent refers to the Bluetooth
15:19:18 22 specification explicitly and that it is part of the intrinsic
15:19:21 23 record to understand what the background of this invention is.
15:19:23 24 And so we think it is fully fair game for us to refer to the
15:19:27 25 Bluetooth specification which is referred to repeatedly here to

15:19:31 1 understand what is meant by these relevant terms.

15:19:33 2 The second issue that is characterized as extrinsic
15:19:37 3 evidence is the prosecution history. We've briefed this. It's
15:19:40 4 our view that related applications, as pointed out in several
15:19:46 5 cases we've cited, do have relevance to the claim construction
15:19:51 6 process. I think there's a little bit of lack of specificity
15:19:56 7 as to how we're referring to it. So there were a couple of
15:20:01 8 comments made about the fact that it's not specific enough to
15:20:05 9 disavow a claim scope, and that's a *Scimed* reference to
15:20:07 10 prosecution history disavowal. We're not arguing that.

15:20:10 11 We're also not arguing prosecution history estoppel,
15:20:14 12 as pointed out in slide 18. That relates to whether or not the
15:20:17 13 doctrine of equivalence can extend beyond something that has
15:20:21 14 been modified.

15:20:22 15 What we are arguing is that patentee used the term
15:20:25 16 "packet", for example, in a very specific way. And he used it
15:20:29 17 in a way that we think is consistent with all of the
15:20:33 18 definitions that they put up in slide 30. And that is that
15:20:36 19 it's digital; that it's a unit; that it's transmitted; that
15:20:39 20 it's binary.

15:20:45 21 THE COURT: All right. Let me ask you right there,
15:20:47 22 because there was some discussion during the tutorial phase of
15:20:51 23 this about that this could also deal with equipment that
15:20:57 24 operates over a wire and potentially an analog transmission.
15:21:02 25 Is it your argument that it has to be binary, or can it apply

15:21:06 1 to analog transmissions and receptions?

15:21:09 2 MR. DINOVO: So I think that we have a fundamental
15:21:11 3 disagreement. And, actually, I didn't hear this in
15:21:15 4 Dr. Akl's presentation. I heard it in the argument.

15:21:18 5 THE COURT: Well, wherever it appeared, focus me,
15:21:23 6 since you have brought this up, on why it only has a digital or
15:21:29 7 binary application as opposed to some other application.

15:21:34 8 MR. DINOVO: A packet -- so I do agree that there's
15:21:37 9 no discussion of what the contents of the packet are, with the
15:21:41 10 exception of "data packet." I will direct the Court's
15:21:43 11 attention to that. But with the synchronization packet, all we
15:21:47 12 know is that it's a packet and that it's used for
15:21:50 13 synchronization. That having been said, the context of the
15:21:53 14 packet and of -- so the Court has to understand that term,
15:21:56 15 since it's not explicitly defined from, the context of person
15:22:00 16 of ordinary skill in the art. And that can be informed by
15:22:03 17 dictionary definitions.

15:22:05 18 The one we have directed to, and we can refer to
15:22:07 19 slide 30, is the first definition in the IEEE dictionary. And
15:22:11 20 that's particularly salient because the IEEE is a group to
15:22:15 21 which CSR belongs and participates. And the definition one
15:22:20 22 you'll see that there's a parenthetical. It's labeled "com."
15:22:25 23 That relates to communications. So this definition is a
15:22:28 24 communications definition for "packet."

15:22:30 25 But as I pointed out, he was intending to criticize

15:22:34 1 us for ignoring the other definitions. Every single one of
15:22:40 2 these is digital, so it doesn't matter which one is used. A
15:22:44 3 packet is not an analog signal.

15:22:47 4 And the other statement that was made is --

15:22:50 5 THE COURT: All right. Then let me ask you, then, if
15:22:54 6 what you say is what is in the patent as a whole, why does not
15:23:01 7 "a signal" get it as a definition?

15:23:05 8 MR. DINOVO: Yes, sir.

15:23:05 9 THE COURT: Why do we have to have the lengthier
15:23:09 10 definition to specifically say "group of binary digits" if only
15:23:17 11 binary digits are used.

15:23:19 12 MR. DINOVO: Well, let me give you an academic answer
15:23:22 13 and then a practical answer, if I can.

15:23:24 14 THE COURT: All right. I'll understand the academic
15:23:27 15 answer, and we'll let the jury hear the practical answer.

15:23:31 16 MR. DINOVO: All right. The academic is that a
15:23:33 17 signal would include more than a packet. A signal can include
15:23:36 18 any sort --

15:23:37 19 THE COURT: I haven't been able to get you guys to
15:23:39 20 tell me what's in a packet or why we use the term "packet."

15:23:42 21 MR. DINOVO: So do you want me to show you the
15:23:45 22 example in the Bluetooth specification of a packet?

15:23:49 23 THE COURT: Well, this kind of gets back to what I've
15:23:51 24 tried to get, and I'm going to treat you every bit as rudely as
15:23:55 25 I treated Mr. King so he'll feel good about that. But, you

15:23:59 1 know, when I hear "packet" -- I'm a juror. I'm sitting over
15:24:01 2 there, and somebody says "packet." I think it's a little type
15:24:04 3 of thing with something in it. I think that's different than
15:24:08 4 my pushing a button and shocking you.

15:24:11 5 But when we talked about synchronization packet, I
15:24:14 6 haven't heard anything that's in a packet. I haven't heard
15:24:18 7 it's anything different from pushing a button and it sends
15:24:22 8 something out that just tells the receiving device to turn the
15:24:26 9 clock on. So is it more than that? Is it less than that?

15:24:30 10 MR. DINOVO: So a packet in our world view has to be
15:24:34 11 digital. So this is important.

15:24:36 12 THE COURT: Okay. Okay.

15:24:36 13 MR. DINOVO: Because it has to contain bits, ones and
15:24:41 14 zeros. A packet under their terminology is a signal, and so it
15:24:45 15 would include, for example, your buzzer in your hand. And so
15:24:48 16 that's not a digital signal. That could be amplitude
15:24:53 17 modulated.

15:24:55 18 THE COURT: So that's your difference between a
15:24:59 19 signal. Your -- in your view, a packet must contain binary
15:25:10 20 digits?

15:25:11 21 MR. DINOVO: It's conceivable that a packet could
15:25:13 22 contain other types of digital data, but that's probably not
15:25:17 23 really worth worrying about. But it would contain digital
15:25:21 24 data. And there's been a statement that everything over the
15:25:24 25 wire is analog. That's false, and our expert will tell you

15:25:29 1 that under oath.

15:25:30 2 The modulation that occurs between the digital signal
15:25:35 3 and putting something over the air or putting something over
15:25:38 4 copper is simply putting it in a format that it can be
15:25:43 5 communicated effectively, but it is still digital data and not
15:25:47 6 analog data, unless it's converted from a digital-analog
15:25:52 7 conversion, but there's not been any discussion of that. It's
15:25:55 8 not true that merely because it goes over the air it's analog.
15:26:00 9 That's not true. And, by the way, their patent nowhere speaks
15:26:02 10 to any sort of analog signal.

15:26:05 11 THE COURT: All right. So where I am here is I
15:26:07 12 understand the argument that "signal" may be too broad because
15:26:11 13 a signal can contain other things. You say it has to contain
15:26:16 14 digital data. So why do we have to go to the, what I feel,
15:26:21 15 somewhat strained definition of "a group of binary digits,
15:26:27 16 which is switched, if at all, and transmitted as a composite
15:26:30 17 whole"? Why couldn't it be, "a signal consisting only of
15:26:35 18 binary digits"?

15:26:36 19 MR. DINOVO: Well, actually I think Your Honor's
15:26:40 20 intuition was correct about what a packet is. It's kind of a
15:26:42 21 thing. It's a unit. And it is transmitted as such. And like
15:26:45 22 in the Internet, it can be routed around as a unit. And that's
15:26:50 23 to be distinguished from the example I gave earlier which was,
15:26:53 24 for example, a modem -- an old-time modem where you hear all of
15:26:58 25 the ones and zeros going through and makes it squeal. That is

15:27:02 1 not a packet. So it is possible to have a digital data that is
15:27:05 2 not a packet. And I encourage this question to be asked of
15:27:09 3 anyone at CSR, whether it's possible to have ones and zeros
15:27:13 4 that are not packetized. And I think the answer would be, of
15:27:16 5 course it is.

15:27:17 6 So a packet has a known meaning. There are variances
15:27:21 7 in it according to context. We think the most accurate context
15:27:24 8 is the packet as described in the communications definition in
15:27:27 9 the IEEE and the packet that's depicted in the Bluetooth
15:27:32 10 specification which is referred to in the background of an
15:27:34 11 invention and as an object of the invention to be seamlessly
15:27:39 12 integrated with. But, regardless, all of them are shuttled
15:27:43 13 around, if you will, as a unit.

15:27:51 14 THE COURT: Well, I will tell you that I am
15:27:53 15 suspicious of a dictionary definition that has 12 different
15:27:58 16 definitions, of picking one of them out and saying that is what
15:28:02 17 a person reasonably skilled in the art would believe this
15:28:05 18 definition was. That's the problem we get into with dictionary
15:28:12 19 definitions.

15:28:13 20 MR. DINOVO: And I agree with Your Honor. And
15:28:15 21 *Phillips*, which I think is the gold standard of claim
15:28:19 22 construction that was an *en banc* decision in the Federal
15:28:21 23 Circuit also expresses some concern about dictionary
15:28:25 24 definitions. The problem we're left with based on this
15:28:29 25 intrinsic record is the author simply expects the reader to

15:28:35 1 understand what a packet is. And so we refer to dictionaries
15:28:37 2 to elucidate that problem.

15:28:40 3 THE COURT: Well, I always look at a tenet of
15:28:44 4 construction of being able to take a definition and substitute
15:28:53 5 it for the word where the word is used or the phrase is used
15:28:57 6 and have it make sense. I have a hard time everywhere "packet"
15:29:01 7 is used substituting "a group of binary digits which is
15:29:05 8 switched, if at all, and transmitted to a composite as a
15:29:09 9 composite whole" and having it make sense to me when I try to
15:29:14 10 put that in where it occurs within the patent.

15:29:19 11 MR. DINOVO: It would be cumbersome, Your Honor,
15:29:21 12 but -- but I don't think a jury is going to understand what a
15:29:24 13 packet is absent that. I also don't think the jury is going to
15:29:28 14 be faced with something like what they have on the screen,
15:29:31 15 where you simply plug in the term over and over. They will
15:29:35 16 read the construction once, and they will apply that
15:29:38 17 construction to the claim.

15:29:39 18 THE COURT: When we are trying this case, what are
15:29:48 19 the respective arguments going to be if I were to use the word
15:29:51 20 "signal"? How does that affect the respective arguments and
15:29:56 21 cases on the merits? Because one of the things that is
15:30:00 22 problematic to most judges that handle patent cases is trying
15:30:04 23 to get the lawyers focused on the way the case is going to be
15:30:08 24 tried other than, Let's fight this battle over here, then let's
15:30:12 25 fight this battle up here. And as you-all well know, that is

15:30:18 1 one of the frustrations I have in this case, is trying to
15:30:21 2 get -- now that it's grown exponentially between California and
15:30:26 3 Arizona and Marshall, focused on how we're actually going to
15:30:30 4 try the case. So what difference does it make at the end of
15:30:34 5 the day to your case or Mr. King's case if we're saying
15:30:42 6 "signal" or "a group of binary digits"?

15:30:44 7 MR. DINOVO: All right, Your Honor. And I think that
15:30:46 8 was the practical example I was going get to, but I went off on
15:30:50 9 a tangent.

15:30:51 10 THE COURT: You can go ahead and get there.

15:30:53 11 MR. DINOVO: Okay. So one of their examples in their
15:30:57 12 tutorial was microwave oven. A microwave oven generates energy
15:31:02 13 because it wants to warm your food up. It's not creating
15:31:06 14 information that somebody wants to receive, but a microwave
15:31:09 15 oven can nonetheless interfere with signals. And so their
15:31:12 16 signal, as I understand it based on their tutorial, they're
15:31:15 17 attempting to say that the energy generated from a microwave
15:31:20 18 oven is a packet -- a synchronization packet and a data
15:31:24 19 packet. We don't think so. We don't think a person of
15:31:27 20 ordinary skill would have that meaning at all.

15:31:29 21 Similarly, radar. Radar detection that's occurred
15:31:34 22 for decades, we want to determine whether someone is trying to
15:31:37 23 find our planes. That radar detection, they would say that's a
15:31:41 24 packet. It's not a packet. It's simply a blip.

15:31:44 25 And so that's the distinction. Are these blips or

15:31:49 1 this random energy that's generated to heat food, is that a
15:31:52 2 packet?

15:31:55 3 THE COURT: Well, that gets back to what I've been
15:31:58 4 trying to get to most of the afternoon, is what is in a
15:32:03 5 synchronization packet? Do you know?

15:32:05 6 MR. DINOVO: It has to be something in our assessment
15:32:09 7 that is used -- again, there's no specificity in the patent.
15:32:14 8 So what we do know is that it is a special type of patent --
15:32:18 9 excuse me -- a special type of packet that is distinguished
15:32:21 10 from a data packet. And the special type of packet is sent,
15:32:24 11 such as in the context of this unilateral communication, to let
15:32:29 12 the receiver know now it's time to listen for data packets.
15:32:34 13 And so I think Mr. King said that there is nothing in the
15:32:37 14 specification that characterizes either the synchronization
15:32:40 15 packet or the data packet. That's not the case. The data
15:32:43 16 packet in column 4, lines 39 through 41 is described in this
15:32:47 17 way: The data packet contains the underlying data to be
15:32:51 18 processed by the receiving device and/or the host processor.

15:32:54 19 So we know that the data packet has to have
15:32:56 20 underlying data that can be processed by the receiving device
15:33:00 21 and/or the host processor. That's explicit in the patent.

15:33:04 22 The synchronization packet tells the receiver you
15:33:07 23 better listen for the data packet. And the idea -- the
15:33:11 24 reason --

15:33:11 25 THE COURT: Does it tell it to listen for a

15:33:13 1 particular type of data packet, or does it just say once the
15:33:20 2 signal is received, that there's a data packet on its way? You
15:33:25 3 know, I'm back to where I started with synchronization packet.
15:33:28 4 Does it do no more than start a clock, or does it alert the
15:33:31 5 receiving device to more than starting the clock?

15:33:36 6 MR. DINOVO: The patent doesn't give a lot of
15:33:39 7 specificity about what the specification --

15:33:41 8 THE COURT: No. But y'all argue about whether
15:33:42 9 there's infringement or not infringement. So --

15:33:47 10 MR. DINOVO: We think --

15:33:47 11 THE COURT: -- that's got to come up at some point.

15:33:50 12 MR. DINOVO: We think a fair reading of this is that
15:33:53 13 the synchronization packet contains some sort of control
15:33:56 14 information that --

15:33:57 15 THE COURT: Which is inexplicable.

15:33:59 16 MR. DINOVO: -- which is un-characterized, and it
15:34:02 17 tells the receiving device now is the time to listen for a data
15:34:05 18 packet, which is a different kind of packet. And so there are
15:34:09 19 two different kinds of packets, a synchronization packet, wake
15:34:14 20 up, a data packet is coming soon. That's all we know.

15:34:18 21 It doesn't -- in our assessment, it doesn't contain
15:34:21 22 data, which is data to be operated by the host device. Because
15:34:25 23 at the point, upon receipt of the sync packet, the receiving
15:34:29 24 device isn't listening for data. So if there were data
15:34:33 25 transmitted in the synchronization --

15:34:34 1 THE COURT: Unless it's synchronization data.

15:34:37 2 MR. DINOVO: That's true, Your Honor.

15:34:38 3 THE COURT: Because you want that in there. Once you
15:34:40 4 open the box on data, then somebody on the jury is going to
15:34:47 5 wonder if you've used the word "data," although it will be me
15:34:52 6 using the word "data" if I accept your construction, what type
15:34:57 7 of data is it? And so far nobody can tell me that. So why
15:35:00 8 would I put "data" as part of the definition?

15:35:04 9 MR. DINOVO: Well, it has to have some information
15:35:07 10 such that it knows -- and by the way, we can go through the
15:35:10 11 prosecution history and maybe this is a good point for me to
15:35:13 12 launch into my presentation and I'll try to do so very
15:35:15 13 quickly. But the timing beacon of the *Robillard* reference was
15:35:20 14 explicitly excluded from same. So a timing beacon is a -- not
15:35:25 15 a packet, not a digital creature. It was simply saying, okay.
15:35:30 16 We're going to send you a packet. And the patentee said, No,
15:35:33 17 no. That's not a synchronization packet. That's timing
15:35:38 18 beacon.

15:35:39 19 So we think that is very strong evidence that the
15:35:41 20 patentee at the time of obtaining the patent was saying that a
15:35:45 21 synchronization packet is a digital creature having a certain
15:35:48 22 format and that is different than a timing beacon.

15:35:52 23 If I could, maybe -- well, let me just make a final
15:35:56 24 few points. On slide 55 Mr. King says that -- that there's the
15:36:12 25 possibility of measuring an offset from a second data packet.

15:36:16 1 That -- that embodiment is claimed in a claim that they have
15:36:19 2 not asserted that's claim 13 having a second data packet. And
15:36:27 3 claim -- I believe Mr. King said that he agrees that -- that
15:36:31 4 claim one doesn't have a second offset or it's not measuring
15:36:37 5 data -- or the characteristics of the signal based on the
15:36:40 6 offset. So that really isn't at issue, but it is claimed in a
15:36:45 7 separate claim.

15:36:46 8 Slide 58 there was discussion about the periodic
15:36:55 9 nature of the listening. And I believe Mr. King said, Well you
15:36:58 10 know, you can hit a keyboard and it might just send it then.
15:37:01 11 But that's not what "periodic" refers to in claim two. It
15:37:04 12 refers to not the sending of the packet, but the listening for
15:37:07 13 a packet. And if you recall the notion that this is a -- one
15:37:10 14 of the problems that was attempted to be solved by the '247
15:37:13 15 patent was that you may only have unilateral or unidirectional
15:37:18 16 communication. The idea was that you could send the
15:37:23 17 synchronization packet, but the only way that would be detected
15:37:27 18 by the host computer, for example, is if it's listening for it
15:37:30 19 on a periodic basis.

15:37:36 20 THE COURT: So I'll be honest with you. I don't
15:37:39 21 understand what effect defining "periodic" is going to mean on
15:37:44 22 this case. How often does it appear in the patent, and what
15:37:50 23 does it really refer to? What difference does it mean -- does
15:37:54 24 it make whether it's regular or irregular, even by your
15:38:03 25 position that it refers to listening for a packet. What --

15:38:07 1 what effect does "periodically" have? I just can't find it
15:38:14 2 having that big of a difference in here.

15:38:16 3 MR. DINOVO: Well, it's only in reference to
15:38:18 4 claim two of the asserted claims.

15:38:20 5 THE COURT: I don't understand why that's a disputed
15:38:23 6 claim, but go ahead. You can explain it.

15:38:26 7 MR. DINOVO: Well, I think the answer is that the
15:38:29 8 periodicity of claim two would -- would encompass only devices
15:38:34 9 that were listening on a regular routine basis and not devices
15:38:38 10 that were --

15:38:38 11 THE COURT: What does "listening on a regular routine
15:38:40 12 basis" mean? If I'm sitting here with this computer on, am I
15:38:44 13 listening?

15:38:45 14 MR. DINOVO: You as a human being?

15:38:47 15 THE COURT: Is my computer listening? Yeah. Is
15:38:50 16 there something to come tell it something?

15:38:51 17 MR. DINOVO: So the way Bluetooth works generally,
15:38:54 18 and I'm happy to be corrected because I'm not an expert, is
15:38:57 19 that there's a synchronization. And this is described in the
15:39:00 20 background section of the patent. And the patent actually
15:39:03 21 talks about it being a continuous synchronization. It
15:39:07 22 describes it as a periodic as well, where it's always
15:39:09 23 happening. And so that -- that sort of continuous
15:39:13 24 communication is required unless, according to the '247 patent,
15:39:19 25 you send on -- you send whenever needed --

15:39:22 1 THE COURT: Continuous communication between what?
15:39:27 2 The thing I have in my ear and the thing I have in the
15:39:30 3 dashboard of my car?

15:39:32 4 MR. DINOVO: Yes, sir.

15:39:33 5 THE COURT: All right. So if that's both on. Okay.
15:39:37 6 Now, describe "regular" and "irregular" as it applies to
15:39:44 7 periodically, then.

15:39:46 8 MR. DINOVO: So regular and irregular, regular
15:39:49 9 would -- so one of the most common examples of period movement
15:39:53 10 is a pendulum. And so that is referred to as periodic
15:39:59 11 movement. All the dictionary definitions -- and I understand
15:40:02 12 there's problems. But all of the dictionary definitions that
15:40:05 13 we cite that are scientific in nature, in addition to the
15:40:10 14 Merriam Webster dictionary, I'll refer to it being with a set
15:40:13 15 time interval. Non-periodic or a-periodic would refer to
15:40:17 16 something that happens only when needed.

15:40:19 17 So, for example, in the Bluetooth bilateral
15:40:21 18 communication mode, you -- because the receiver is synced to
15:40:27 19 the transmitter in an active way, it doesn't have to be
15:40:31 20 listening. It will send it on a channel that it knows I will
15:40:35 21 send it on and at a time that it knows I will send it. And so
15:40:39 22 it's kind of an ad hoc communication that is -- because of the
15:40:43 23 synchronization, it can happen when you want.

15:40:46 24 THE COURT: All right. I reach over my dashboard and
15:40:49 25 I turn off my ability to receive phone calls in my car. Now

15:40:56 1 there was talk when Mr. King was presenting about turning on a
15:41:02 2 computer and turning off a computer. How does that fit? Do we
15:41:06 3 no longer worry about regular or irregular if the -- if a
15:41:10 4 device on one end or the other is turned off?

15:41:18 5 MR. DINOVO: Well, --

15:41:18 6 THE COURT: Or is your argument on regularity, does
15:41:21 7 that only occur when a sending device and a receiving device
15:41:28 8 are both on?

15:41:29 9 MR. DINOVO: Well, the method -- so method claim
15:41:32 10 would have to be practiced. And so when -- if both devices are
15:41:37 11 off, then, presumably, no steps are being taken.

15:41:41 12 THE COURT: Okay. How about if one of them is off?

15:41:43 13 MR. DINOVO: If one of them was off, the method
15:41:46 14 appears to me, according to claim two, to being carried out by
15:41:50 15 the receiving device because it says listening for said
15:41:54 16 synchronization packet periodically within a predetermined
15:41:57 17 window of time.

15:41:58 18 And so, basically -- and these numbers are
15:42:01 19 arbitrary -- it says let's listen for a synchronization packet
15:42:05 20 every tenth of a second or every ten seconds and see if we hear
15:42:09 21 it. And if we don't, then we'll check again later.

15:42:13 22 THE COURT: Well, "later" kind of conjures up
15:42:20 23 irregularity to me.

15:42:22 24 MR. DINOVO: The system would not operate based on --
15:42:25 25 based on their objective here, which is that the -- there's no

15:42:30 1 bilateral or bidirectional communication. The system would not
15:42:33 2 operate effectively -- and I think that the way the patent
15:42:37 3 discusses it -- without the receiver listening with regularity,
15:42:41 4 because the receiver does not know when the transmitter is
15:42:44 5 going to send it.

15:42:45 6 And the -- by the way, Your Honor, you're asking
15:42:50 7 about practical. I'm not trying to get into too much argument,
15:42:52 8 but it's our understanding that CSR doesn't claim they practice
15:42:56 9 this invention. And as far as we're aware, no one does it this
15:42:59 10 way. So if you're asking for real-world examples of how this
15:43:03 11 is actually implemented, I don't think there are any.

15:43:07 12 THE COURT: Well, you're going to have to do
15:43:09 13 something with the jury to make them think that this is not
15:43:14 14 just some ephemeral deal out there. They're going to bring
15:43:18 15 their real-world experiences, too, which is a problem that I
15:43:21 16 find I have with patent lawyers from time to time. But you're
15:43:26 17 going to have to get this down to where they're going to
15:43:31 18 understand what you're talking about, not just CSR saying we
15:43:34 19 invented this wonderful thing and we don't use it.

15:43:41 20 And you're saying, well, you know, they're accusing
15:43:47 21 us of infringing on it, but they're not using it. Is that what
15:43:50 22 the argument is going to be at trial?

15:43:52 23 MR. DINOVO: No, Your Honor. I think what we're
15:43:54 24 going to say -- because, apparently, they're going to claim
15:43:58 25 that microwaves are packets, we're going to say that packets

15:44:01 1 aren't microwave signals. That to the extent we try to
15:44:03 2 identify sources of noise based on microwaves in the vicinity
15:44:06 3 of a Wi-Fi network, that's not a synchronization packet and a
15:44:10 4 data packet.

15:44:11 5 THE COURT: I understand that. I'm back to why is
15:44:13 6 claim two and the word "periodically" important to the two of
15:44:21 7 you?

15:44:22 8 MR. DINOVO: It's a scope of the claim. And if
15:44:24 9 you're asking about specifics, obviously, it's our contention
15:44:27 10 that we don't infringe at all. But, I mean, I think the
15:44:30 11 general --

15:44:34 12 THE COURT: Of course, there's a large part of this
15:44:36 13 lawsuit where it's your contention -- their contention that
15:44:39 14 they don't infringe on you at all.

15:44:41 15 MR. DINOVO: That's correct.

15:44:49 16 THE COURT: And somebody is going to get tagged for
15:44:51 17 an awful lot of money at the end of the day, but that's the way
15:44:53 18 the systems go.

15:44:54 19 MR. DINOVO: That's true, Your Honor. I think if
15:44:56 20 you're asking about real-world implication of this on our case,
15:45:00 21 we don't think that claim two makes a material difference. But
15:45:02 22 we do feel confident that "periodic" in the context of any
15:45:07 23 scientific writing has a certain meaning and we're right about
15:45:12 24 it.

15:45:12 25 THE COURT: Okay.

15:45:42 1 MR. DINOVO: So very briefly, let me go over some
15:45:43 2 points we haven't discussed in my presentation. I think I
15:45:44 3 mentioned this, but the '247 patent, there's been a lot of
15:45:46 4 discussion about analog and wireless being the same, which we
15:45:49 5 disagree with. But in any case, the '247 patent nowhere speaks
15:45:52 6 to analog communication. The term "packet" connotes explicit
15:45:57 7 digital structure, and there's no discussion of "packet" being
15:46:03 8 analog.

15:46:04 9 It's interesting in their brief, and some of it --
15:46:08 10 Mr. King mentioned some of this in his presentation. They
15:46:14 11 refer to a packet as a signal but almost acknowledging that the
15:46:17 12 signal is overbroad, they say, Well, if there's a definition
15:46:21 13 that we like on slide 30, it's this block. And they say the
15:46:24 14 use of a block to transmit data. And so that's not so far from
15:46:29 15 what we proposed, except that it -- well, at least it contains
15:46:33 16 data and it's a block. But it's not explicitly digital, and
15:46:38 17 it's not switched as a block. That appears to be the
15:46:40 18 distinction. But they don't seem to have a philosophical
15:46:44 19 aversion to at least some of our -- some of our construction.

15:46:48 20 THE COURT: And I've said I think "signal" may be a
15:46:52 21 little broad, but I think your definition is a little
15:46:56 22 unwieldy. I would wish that you could get together, because my
15:47:02 23 other problem is, as I've said, a person ordinarily skilled in
15:47:07 24 the art, which of the 12 definitions is he going to take?
15:47:10 25 Which means one of you needs to tell me the definition of who

15:47:16 1 the person ordinarily skilled in the art is in this case. Is
15:47:20 2 he an electrical engineer with three years of practical
15:47:28 3 experience? Who is the person ordinarily skilled in the art?
15:47:32 4 Because you can line up ten people of skill in electrical
15:47:36 5 engineering, and we might get ten of them picking ten different
15:47:41 6 of the 12 definitions out of there.

15:47:44 7 See, that's the difficulty I have in trying to
15:47:47 8 reconcile when I have two definitions, neither -- or proposed
15:47:53 9 constructions, neither one of which I think exactly gets
15:47:57 10 there. Then it's up to me to come up with what it is. And
15:48:02 11 unless I know who the person ordinarily skilled in the art is,
15:48:07 12 I don't know what definition he is likely to choose.

15:48:11 13 I do believe that "a block of information that is
15:48:15 14 transmitted within a single transfer operation" does come
15:48:20 15 closer than either one of your definitions does.

15:48:23 16 MR. DINOVO: The block of information transmitted --
15:48:26 17 transmitting data, if the block of information is digital data,
15:48:31 18 then that does come closer. But I -- I understand the Court's
15:48:35 19 concern about competing dictionary definitions. I would simply
15:48:40 20 point out that the IEEE dictionary definition that we pointed
15:48:43 21 to was the one that's pertinent to communications, and also
15:48:47 22 that the specification specifically calls out the Bluetooth
15:48:51 23 specification as its context and says that it is to work
15:48:56 24 seamlessly with that specification. And so we have submitted
15:48:59 25 what that data structure looks like, and it is absolutely

15:49:02 1 consistent in every respect with ours.

15:49:04 2 And I would refer again the Court's attention to the
15:49:06 3 *Phillips* case. We've been accused of importing unnecessary
15:49:11 4 limitations. We don't think that's true at all. We're just
15:49:16 5 trying to set forth what a packet means to the inventor. And,
15:49:19 6 of course, the *Phillips* case gives ultimate weight to the
15:49:22 7 specification and says that claims must be read in view of the
15:49:26 8 specification of which they're a part. And, usually, it's
15:49:29 9 dispositive. It's the single best guide to the meaning of a
15:49:31 10 disputed term.

15:49:32 11 So it wasn't us that referred to the Bluetooth
15:49:35 12 specification. It was them that did it repeatedly and gives a
15:49:38 13 context for what "packet" means.

15:49:47 14 The examiner in the prosecution history -- and I'll
15:49:50 15 go over this briefly because we've discussed it -- said that
15:49:53 16 the prosecution did -- the patent specification doesn't even
15:49:57 17 refer to receiving a signal. It refers only to creating a
15:50:01 18 packet. And Mr. King had an interesting spin on it. He was
15:50:05 19 saying, Well, they must have understood at the time that it was
15:50:07 20 the same thing.

15:50:08 21 That's not, I don't think, how a person would have a
15:50:10 22 fair reading of the prosecution history. A think a fair
15:50:13 23 reading of the prosecution history is the examiner saying
15:50:15 24 there's no discussion of signal here absent a packet. And the
15:50:19 25 response of the patentee was pulling the reference to signal

15:50:23 1 altogether. And he didn't say at the time, Well, of course
15:50:26 2 "packet" and "signal" are the same thing. He just said, Okay.
15:50:29 3 I'll pull my reference to "signal," and that's that. Of
15:50:38 4 course, if the patentee uses different terms, they're presumed
15:50:41 5 to mean different things.

15:50:45 6 By the way, there was a reference to the fact that we
15:50:48 7 called one patent a parent of the other. The actual history or
15:50:55 8 posture of the two patents is they both claim priority to the
15:50:59 9 same provisional application. So the declarant said that they
15:51:02 10 both shared common subject matter with that application, and
15:51:07 11 they are family members in that sense.

15:51:19 12 CSR also said something interesting that I think we
15:51:21 13 can understand where they're going with this, which is that,
15:51:25 14 well, of course packets sometimes contain sync data and --
15:51:30 15 synchronization information and data payloads. Well, that was
15:51:36 16 the prior art that's disclosed here, is the Bluetooth
15:51:38 17 specification had a packet that had information -- control
15:51:42 18 information at the front and data information in the second
15:51:44 19 part. And that was all in one packet in digital construct that
15:51:48 20 had very clear definitions and number of bytes.

15:51:51 21 And the invention, the whole invention is, we're not
15:51:53 22 going to do that. We're going to put a sync packet over here,
15:51:59 23 send it, and then have a data packet over here. So we're going
15:52:01 24 to segregate those. So, yes, we are saying that they have to
15:52:05 25 be segregated because that's what the core of the invention is.

15:52:08 1 THE COURT: I don't have a problem with that. I just
15:52:10 2 can't figure out what goes in the sync packet. Apparently,
15:52:14 3 nobody else can either.

15:52:19 4 MR. DINOVO: Just with the data packet, a signal used
15:52:22 5 to transport information, essentially, they're eviscerating the
15:52:25 6 whole term "packet." And so now it's a signal, as we've
15:52:28 7 discussed. And used to transport information --

15:52:31 8 THE COURT: I'll ask you what I asked Mr. King: Why
15:52:35 9 do we have to construe that term? "First data packet" seems to
15:52:40 10 me to be really clear and plain. How can it ever be anything
15:52:47 11 else other than the packet that is received after the receiver
15:52:52 12 has told to expect the data packet?

15:52:54 13 MR. DINOVO: If we have a construction of "packet,"
15:52:57 14 then that gets us a long way, because obviously the parties
15:53:01 15 have a disagreement about what a packet is. The second
15:53:05 16 reason --

15:53:05 17 THE COURT: But do you have a greater definition --
15:53:08 18 greater disagreement other than whether it's binary or binary
15:53:12 19 and analog?

15:53:13 20 MR. DINOVO: Yes. We think it has to be -- they use
15:53:16 21 the term "block." We say it has to be a set or an ordered set
15:53:20 22 of data in a structure, binary data, that is essentially
15:53:24 23 switched or transmitted. They use the term "single transfer."

15:53:27 24 THE COURT: I thought you said you could live with
15:53:28 25 "block" if it said a block of binary data.

15:53:32 1 MR. DINOVO: We think it has to be transmitted and
15:53:35 2 switched as a single unit. The problem with "transmitted as a
15:53:39 3 single unit" and where we expect this disagreement to go is
15:53:43 4 things like modems, which aren't packets by any normal
15:53:47 5 understanding. And so you start it, and the transmission lasts
15:53:51 6 a minute and then it's over. That's not a packetized digital
15:53:57 7 data transmission. It has to be something that can be routed
15:54:00 8 because it is a packet. It's treated as a unit by the
15:54:03 9 communications network. That's the whole notion of a packet.

15:54:06 10 So the concern is "transmitted as a unit," what does
15:54:09 11 that mean? They're going to say it would include things that
15:54:12 12 are not conventional packets is our fear.

15:54:15 13 THE COURT: Well, it says in definition number nine
15:54:18 14 out of the IEEE dictionary, a block of information is
15:54:22 15 transmitted with a single transfer operation.

15:54:24 16 You say based on my -- on everybody's review of the
15:54:28 17 patent that I should accept the position that that block of
15:54:33 18 information has to be binary information or a block of binary
15:54:39 19 digits. What's wrong with the rest of that definition if I go
15:54:42 20 that way.

15:54:43 21 MR. DINOVO: It's not inaccurate. We think it's
15:54:45 22 incomplete because it doesn't talk about the switching. I
15:54:48 23 think the issue will become, Your Honor, what is a transfer
15:54:51 24 operation? I think there is clearly digital data that is not
15:54:56 25 packetized that can be communicated in one session, if you

15:55:00 1 will. I'm going to send you a fax, and it's all going to come
15:55:03 2 in two minutes. And the question then becomes, is that a
15:55:07 3 single transfer operation or not? We think introducing the
15:55:10 4 notion of switching makes it clear that it can be routed and it
15:55:13 5 is treated as a cohesive unit by the communications network as
15:55:17 6 opposed to just a stream of ones and zeros, which is a
15:55:19 7 non-packetized digital communication.

15:55:25 8 The second reason that we think data -- data
15:55:28 9 packet --

15:55:28 10 THE COURT: Might as well alert your clients to how
15:55:31 11 much this is going to cost, because this case is going to go to
15:55:34 12 the Federal Circuit at least one time. After you finish
15:55:36 13 spending the millions of dollars to try the case, it's going to
15:55:39 14 come back, and it may come back two or three times. This is
15:55:43 15 not going to end in my lifetime -- I can tell you that -- if
15:55:47 16 you-all can't get closer in agreeing on how these things work,
15:55:52 17 because this is going to be like every other case that goes to
15:55:55 18 the Circuit.

15:55:56 19 I'm going take my shots and I'm going to give my
15:55:58 20 definitions and you're going to try it. And then it's going to
15:56:01 21 go up there, and they're going to dig down in it and find for
15:56:05 22 one side or the other or both something that I've made a
15:56:08 23 mistake on, because they do that in 65 to 70 percent of the
15:56:12 24 cases. And then it's going to come back, and we're going to
15:56:15 25 pick it up at some stage and we're going to try it again. And

15:56:17 1 it's going to go up again, and then it's going to come back
15:56:20 2 again.

15:56:21 3 And I hope you-all have focused on it, because that's
15:56:24 4 what's going to happen. I am not going to reach a perfect
15:56:28 5 bulletproof result in this case because judges don't do it in
15:56:31 6 patent cases. So everyone would be better off, particularly in
15:56:35 7 this particular iteration of this case, the '297 patent, to try
15:56:39 8 to come closer on agreeing on some of these definitions.

15:56:43 9 MR. DINOVO: Well, on the term "packet," Your Honor,
15:56:49 10 we actually had some discussions which I'll not reveal.

15:56:51 11 THE COURT: You don't need to reveal.

15:56:53 12 MR. DINOVO: But it may warrant further discussion
15:56:55 13 between us that we can try to do over the next week or so.

15:56:59 14 THE COURT: All right.

15:57:02 15 MR. DINOVO: But Your Honor did ask why we think data
15:57:04 16 packet needs to be construed. I do think it has a plain and
15:57:08 17 ordinary meaning. But the reason we wanted to construe it, and
15:57:10 18 our fears have been realized, I think that CSR wants to say
15:57:14 19 that a sync packet and a data packet can be the same signal.
15:57:17 20 So, for example, in a radar or microwave or what have you, it
15:57:21 21 can be the same signal. And we think the patent -- a fair
15:57:24 22 reading of the patent is that they're different, that a sync
15:57:26 23 packet and a data packet are two different animals. And so --

15:57:31 24 THE COURT: Mr. King, did you say that?

15:57:32 25 MR. KING: Well, I need to hear it back again, but --

15:57:35 1 THE COURT: All right. Hear it back again, because
15:57:37 2 what I understood you to say and Dr. Akl to say and with what
15:57:41 3 you put on the board during the tutorial, on the screen, that
15:57:45 4 there were different frequencies, and that was the wavy lines
15:57:52 5 going between the towers depending on what kind of device was
15:57:56 6 transmitting. And then there were different intervals,
15:58:01 7 offsets, if you will, between the time the synchronization
15:58:05 8 packet hit and the data packet hit.

15:58:09 9 And I didn't hear you saying -- and I'll ask
15:58:13 10 Mr. DiNovo to repeat that, but I didn't hear you saying that
15:58:17 11 all of these are the same. If I missed that, today is the day
15:58:21 12 I need to know that. So go ahead, Mr. DiNovo, and say what you
15:58:25 13 were going to say. And I'll let Mr. King interrupt you because
15:58:28 14 I want to hear what he thinks he told me and whether I'm
15:58:31 15 getting it or whether I'm not.

15:58:33 16 MR. DINOVO: Okay. And one point of clarification.
15:58:35 17 I didn't mean to say the same signal, but what I meant to say
15:58:39 18 was --

15:58:39 19 THE COURT: That is what you said.

15:58:40 20 MR. DINOVO: Well, I do mean the same type of
15:58:42 21 signal. So, for example, when they're talking about little
15:58:47 22 blurbs of microwave oven and they're saying we're going to
15:58:49 23 measure the offset between these two, there's no difference
15:58:51 24 between those two blurbs. One is the same as the next. So I'm
15:58:56 25 not saying they're the same one in time, but these are the same

15:59:00 1 energy pulses, if you will.

15:59:01 2 THE COURT: But different frequencies though.

15:59:04 3 MR. KING: Can I respond to that?

15:59:05 4 THE COURT: Yeah.

15:59:05 5 MR. KING: I think that Mr. DiNovo keeps referencing
15:59:09 6 microwave, and I think that's a great illustration to
15:59:11 7 illustrate the difference in our opinion. He says that I see
15:59:14 8 microwave noise from a microwave oven as being synchronization
15:59:20 9 data packets. What the receiver hears is just a blur of
15:59:26 10 information coming from this device that's operating. That's
15:59:30 11 not what we're talking about here.

15:59:32 12 I'm talking about and the patent is talking about
15:59:35 13 just discreet blocks of signal that are being sent from
15:59:38 14 devices. And if you looked at Mr. Akl's tutorial, he was
15:59:43 15 showing how these devices send blocks of signals, frequency
15:59:48 16 blasts, at different timing intervals, and that you could
15:59:52 17 identify this source based on the timing intervals being
15:59:56 18 blasts. That's not microwave ovens. So just so there's no
16:00:00 19 confusion about that, we're not saying that a device sitting in
16:00:03 20 the corner --

16:00:03 21 THE COURT: Perhaps y'all helped create the confusion
16:00:06 22 by having microwave ovens and radar in your tutorial.

16:00:09 23 MR. KING: And the reason we did that, Your Honor, is
16:00:12 24 just to explain -- Dr. Akl was just illustrating the point that
16:00:16 25 all of these devices create noise in a similar frequency band.

16:00:20 1 He was just -- that wasn't to illustrate the patent. That was
16:00:23 2 just to describe the problem -- one of the problems that in
16:00:25 3 this room, there might be any number of devices that are
16:00:28 4 sending signals or just leakage from operation that are within
16:00:33 5 the same frequency band.

16:00:34 6 THE COURT: So you're willing to tell Mr. DiNovo that
16:00:37 7 we're not going to litigate microwave ovens when we come to
16:00:41 8 trial?

16:00:41 9 MR. KING: I can say that with some confidence.

16:00:44 10 THE COURT: Are you comfortable now?

16:00:46 11 MR. DINOVO: Well, that gets us a long way, but
16:00:48 12 there's another issue here which I think is the same issue.
16:00:51 13 Which I said they think the synchronization packet and the data
16:00:54 14 packet can be the same. And so, for example --

16:00:56 15 THE COURT: I didn't hear you say that.

16:00:57 16 MR. KING: I didn't say that.

16:00:58 17 THE COURT: Are you arguing to me that the
16:01:01 18 synchronization packet and data packet will be the same?
16:01:03 19 Because I believe I heard you say, regardless of how I construe
16:01:07 20 these claims, there's always going to be an offset between the
16:01:12 21 synchronization packet and the data packet.

16:01:14 22 MR. KING: Correct.

16:01:14 23 THE COURT: All right. Then that's what --

16:01:16 24 MR. DINOVO: So I think maybe I'm not being clear
16:01:19 25 when I say the same. I mean the same type of signal. So we

16:01:23 1 think the synchronization packet is one type of data, and
16:01:26 2 the --

16:01:28 3 THE COURT: All right. You first said same signal.
16:01:30 4 Now, are you talking about the data that's contained in the
16:01:33 5 synchronization packet, which nobody can tell me anything
16:01:36 6 about, as being distinct from the data that's in the data
16:01:42 7 packet which perhaps somebody can tell me about?

16:01:45 8 MR. DINOVO: Yes, Your Honor. We have very limited
16:01:48 9 information about the synchronization packet, but we know that
16:01:50 10 it contains some sort of data that is used for
16:01:53 11 synchronization. And we know that the data packet has data
16:01:56 12 that is used for processing by the host.

16:01:57 13 THE COURT: Does it matter or does what this device
16:02:00 14 do is just interface with things like Bluetooth and doesn't
16:02:06 15 make its own decision as to what the synchronization data is?
16:02:11 16 It just passes it along? My question, therefore, being: Do
16:02:14 17 you have any idea what the synchronization data is?

16:02:17 18 MR. KING: I believe I do, and I believe it's
16:02:20 19 explicit in the patent, that the synchronization packet is a
16:02:24 20 blast of signal that the device that's operating the method, or
16:02:30 21 the method, uses to start the clock to time the offset. It's
16:02:35 22 described throughout. It's described in the claims. It's that
16:02:38 23 simple.

16:02:38 24 THE COURT: All right. And that is not then
16:02:41 25 contained in the data packet.

16:02:43 1 MR. KING: The data packet marking the end so you can
16:02:47 2 identify the offset. The data packet is distinct from the
16:02:50 3 synchronization signal. Now, the synchronization signal
16:02:51 4 arrived, you start the clock. You receive the data packet,
16:02:54 5 which is a distinct, separate event. You measure the offset,
16:02:57 6 and you can identify the source of data.

16:03:00 7 THE COURT: All right. You know the source of the
16:03:01 8 data. But the data packet really has data in it. It's the
16:03:05 9 kind of thing that the receiver wants to get to work with; is
16:03:08 10 that right?

16:03:09 11 MR. KING: I think that's right.

16:03:10 12 MR. DINOVO: So the problem is you didn't ask whether
16:03:12 13 the synchronization packet has data that it wants to work
16:03:15 14 with. The problem we have based on the briefing is that they
16:03:19 15 read "synchronization packet" and "data packet" simply to mean
16:03:23 16 packet one and packet two and the receiver decides whether
16:03:28 17 they're sync and the data packet. And then they just measure
16:03:30 18 an offset between the two, and they don't actually have any
16:03:32 19 specific meaning outside of a numbering system.

16:03:35 20 And so, in other words, it's a sequence of data
16:03:37 21 packets one and two, not that "synchronization packet" has a
16:03:40 22 certain type of control information associated with
16:03:44 23 synchronization and the data packet has a certain type of data
16:03:46 24 that is to be processed by the underlying processor. That's
16:03:49 25 our contention. That's why we proposed a construction for

16:03:52 1 "data packet," because we wanted to distinguish it from
16:03:55 2 "synchronization packet."

16:03:56 3 MR. KING: And the patent is explicit, that when it
16:03:59 4 receives a packet, it -- the method is describing starting the
16:04:04 5 clock, finding an offset, identifying a device. Now, that's
16:04:08 6 what the method is describing. Whether that -- that first
16:04:11 7 packet includes data that device one might want to be
16:04:16 8 communicating to the receiving device isn't relevant to the
16:04:19 9 practice of this patent. What's relevant to the practice of
16:04:22 10 the patent is it receives a signal, it goes (snaps fingers),
16:04:24 11 got to start the clock, going to wait for the next one, going
16:04:27 12 to measure the difference, and I'm going to be able to identify
16:04:30 13 the source of that information -- the source of those
16:04:33 14 transmissions based on that.

16:04:35 15 That's what the claims talk about. That's what the
16:04:38 16 specification talks about. That's why we're both having such a
16:04:41 17 hard time pointing to what in the patent is synchronization
16:04:44 18 information, because the patent doesn't talk about it. It
16:04:47 19 doesn't care. The data, that first packet, can be a packet of
16:04:51 20 whatever. The method is -- that's practicing the invention is
16:04:56 21 treating that as a synchronization packet because it's starting
16:04:59 22 the clock. And that's -- that's what the patent is describing.

16:05:03 23 THE COURT: All right. So Mr. DiNovo is just an
16:05:07 24 alarmist when he says he's going to hear at trial that the
16:05:11 25 receiver processes some kind of data from the synchronization

16:05:16 1 packet?

16:05:17 2 MR. KING: I think he's an alarmist.

16:05:19 3 THE COURT: Okay.

16:05:19 4 MR. KING: I mean, the purpose of the method --

16:05:21 5 THE COURT: There you go.

16:05:22 6 MR. KING: The purpose of the method is that packet
16:05:26 7 has a function in the practice of the patent, and that's just
16:05:29 8 to identify an offset.

16:05:30 9 MR. DINOVO: I think the problem we have with what
16:05:33 10 Mr. King is saying is that I think he is saying that the
16:05:37 11 synchronization packet and the data packet are simply labels
16:05:40 12 put on by the receiver; that they're not different types of
16:05:44 13 packets. So the synchronization packet in his world view can
16:05:47 14 be identically structured to the data packet. It may even have
16:05:53 15 the exact same data in it. I think that's -- again, I think
16:05:56 16 what they're saying is basically "synchronization packet" and
16:05:58 17 "data packet" could have, in the patentee's parlance, simply
16:06:01 18 been replaced by "packet one" and "packet two" and measuring an
16:06:04 19 offset between packet one and packet two.

16:06:07 20 MR. KING: I think I can illustrate an example that
16:06:11 21 would help the Court understand why --

16:06:11 22 THE COURT: Let me tell you, if I'm having trouble
16:06:13 23 getting to the crux of this, I want you to think about the
16:06:18 24 people that are going to be sitting in those chairs having
16:06:21 25 trouble getting to the crux of it. Because I've spent no small

16:06:26 1 amount of time on this, and today I'm having a hard time
16:06:31 2 getting questions answered about how it works.

16:06:36 3 Part of it is because I don't know, and part of it is
16:06:39 4 because I'm trying to get you to explain things simply, which
16:06:43 5 patent lawyers have a real problem doing. And I mean that the
16:06:51 6 way it sounds. Y'all do a great job hiding the ball from the
16:06:54 7 Court and not ever getting to the point that the Court wants.
16:06:58 8 But you've got to understand it doesn't matter what you think
16:06:58 9 the patent says or what the inventor thinks the patent says.
16:07:02 10 You need to focus on what the Court needs to construe it.

16:07:05 11 And if you're not getting it across to the Court,
16:07:08 12 you're not going to get it across to the jury. And then you
16:07:13 13 really don't know what's going to happen, and then the whole
16:07:15 14 thing goes to Washington as a mess. And that's the problem in
16:07:18 15 a lot of patent cases, and this the poster child for my getting
16:07:24 16 all kinds of conflicting information and no agreements and no
16:07:28 17 straight answers out of anybody. So now give me your example.

16:07:31 18 MR. KING: Well, I'm doing my best to give straight
16:07:34 19 answers, and I apologize that I've been unable to be clear.
16:07:38 20 But I think a good example would be if a device sends a data --
16:07:45 21 two packets, and they send the same packet, and they send the
16:07:49 22 same information in the packets to a receiver. Now, for
16:07:52 23 purposes of the patent, what the patent is describing, the
16:07:57 24 receiver receives the first packet, starts the clock, receives
16:08:00 25 the second packet and goes based on that --

16:08:03 1 THE COURT: So it doesn't matter what is in the first
16:08:05 2 packet. All it does is start the clock. It can be exactly
16:08:10 3 what's in the data packet.

16:08:11 4 MR. KING: That's what I'm saying. I think in a
16:08:13 5 particular application, I don't know what it would be. But
16:08:15 6 generally --

16:08:16 7 THE COURT: But what the patent does is turn on --

16:08:18 8 MR. KING: It looks at the offset and it says, based
16:08:20 9 on that offset -- it's set in the claims. Claim one is pretty
16:08:23 10 explicit. You measure the offset, you identify the offset, and
16:08:27 11 based on that, you identify the source of the device -- this
16:08:31 12 source of transmission.

16:08:32 13 THE COURT: Is that where the patent stops? It is a
16:08:34 14 patent to solely determine the source --

16:08:39 15 MR. KING: Claim one.

16:08:40 16 THE COURT: -- in the data packet.

16:08:41 17 MR. KING: Claim one stops there. Some of the
16:08:44 18 dependent claims go into other areas.

16:08:47 19 THE COURT: Sure. Sure. So why can't it be "packet
16:08:50 20 one" and "packet two."

16:08:51 21 MR. DINOVO: Because the -- well, first of all,
16:08:54 22 there's going to be invalidity issues. But the reason the
16:08:58 23 patent -- that doesn't work in the patent is the
16:09:00 24 synchronization packet is intended to notify in a
16:09:04 25 unidirectional communication system that you need to start

16:09:08 1 listening. And not just start listening, you start listening
16:09:11 2 at a predetermined window for something that is now coming. So
16:09:15 3 it is a wake-up packet. And, again, we've talked about the
16:09:20 4 fact that the synchronization packet is not described in any
16:09:25 5 detail.

16:09:26 6 THE COURT: So what's the difference if it's an
16:09:28 7 alarm clock or a clock radio? What's the difference if it
16:09:33 8 wakes you up with a loud ringing or it wakes you up with music
16:09:35 9 or it wakes you up with your television coming on? It's the
16:09:38 10 wake-up call. What difference does it make what's in it?

16:09:40 11 MR. DINOVO: Well, a timing beacon wasn't the same
16:09:43 12 according to them in the prosecution history. They said that
16:09:45 13 wasn't a synchronization packet. So I guess we can do it by
16:09:48 14 purposes of exclusion. We know that they described the data
16:09:52 15 packet as containing data that is intended to be operated on by
16:09:55 16 the host processor. So, presumably, it's not that. It's not a
16:09:59 17 timing beacon. So it is some sort of control packet that
16:10:02 18 contains synchronization information. And we don't think a
16:10:06 19 fair reading of the patent is that they're identical. So I
16:10:08 20 think we have at long last been able to crystallize what the
16:10:12 21 real dispute is here about synchronization of data packet.

16:10:15 22 THE COURT: Yeah. It's only taken me two hours and
16:10:18 23 40 minutes to find out what your dispute is.

16:10:21 24 MR. KING: I'd love to be able to address the --

16:10:21 25 THE COURT: It wasn't clear from your briefs. I'll

16:10:23 1 tell you that. And I got a lot of prose in the briefs, and I
16:10:27 2 got a lot of attachments.

16:10:29 3 MR. DINOVO: Well, I will join Mr. King in his
16:10:31 4 apology for our lack of clarity.

16:10:34 5 THE COURT: If you're going to apologize, apologize
16:10:37 6 for all the patent lawyers. You've done this no better or no
16:10:40 7 worse than anybody else has. But you've got to narrow this
16:10:44 8 down to what we're talking about. You know, when I ask a
16:10:49 9 question about what's in the patent, I want you to tell me what
16:10:52 10 you think, as accomplished patent lawyers who have dealt with a
16:10:58 11 lot of these, the patent is saying, not to just regurgitate up
16:11:03 12 to me here's where the language is. That's where there is a
16:11:07 13 resistance among lawyers. You know, tell me what the patent is
16:11:10 14 supposed to do, not what it says it's supposed to do.

16:11:13 15 Because, see, I am construing claims, which means I'm
16:11:17 16 just not taking -- neither of you are arguing really to me to
16:11:22 17 take specific language out of the patent for these
16:11:25 18 constructions. You both have a perspective on it. So what I
16:11:32 19 want to know is why this perspective is better than the way the
16:11:38 20 patent works. And, you know, I sit here at one moment and I
16:11:44 21 think "signal" is really good, but I probably think it's too
16:11:47 22 broad. And then I look at "a group of binary digits which is
16:11:51 23 switched, if at all, and transmitted to a composite whole."
16:11:55 24 I'm not sure that the jury is ever going to understand that.

16:12:04 25 And now, you know, we're down into the packets. I've

16:12:07 1 questioned whether or not "first data packet" needs any
16:12:12 2 construction because it seems obvious to me that it is the
16:12:19 3 first packet of data that comes after the synchronization
16:12:22 4 packet. Mr. DiNovo doesn't like that because "synchronization
16:12:25 5 packet" and "data packet" can be the same thing, you say.

16:12:30 6 So give me some help here, guys. What really works
16:12:33 7 for the jury to understand what you're arguing about?

16:12:36 8 MR. DINOVO: Actually, Your Honor, just for the
16:12:38 9 record, we absolutely don't think they can be the same thing.
16:12:41 10 My concern is I think you asked why there's a difference in our
16:12:44 11 approaches.

16:12:45 12 THE COURT: I thought you told me you had concern
16:12:48 13 that it would be the same thing.

16:12:49 14 MR. DINOVO: They will argue it's the same. That's
16:12:51 15 correct, Your Honor.

16:12:52 16 THE COURT: Well, if they're going to argue it's the
16:12:54 17 same, then their perception is that it's the same or could be
16:12:58 18 the same.

16:12:58 19 MR. KING: I've said that.

16:13:00 20 THE COURT: So I don't understand -- now I really
16:13:02 21 don't understand what your position is. Mr. King is telling me
16:13:06 22 that they can take two packets that contain exactly the same
16:13:12 23 thing and they can sequence them. The first one goes
16:13:16 24 through -- we're calling it in the patent a synchronization
16:13:18 25 packet -- and it turns on the clock. Then another packet that

16:13:23 1 is exactly -- contains exactly the same data goes through after
16:13:29 2 the offset, and by that same set of data going through, it
16:13:34 3 tells the receiver what the source of the data was. Is that
16:13:38 4 what you're saying?

16:13:39 5 MR. KING: That's what I'm saying. That's what the
16:13:42 6 specifications and claims say.

16:13:45 7 MR. DINOVO: I agree that's what he's saying.

16:13:48 8 THE COURT: So you don't need to be afraid of it
16:13:50 9 anymore because that's what it is. So where is your
16:13:53 10 definition -- why do we need "first data packet" to be
16:13:57 11 construed? Why is it not just obvious that it's the first
16:14:03 12 packet that comes through after the synchronization packet?

16:14:06 13 MR. DINOVO: Because they are mistaken that the
16:14:10 14 synchronization -- that a synchronization packet can be a data
16:14:13 15 packet. The patent specification talks about the
16:14:16 16 synchronization packet being specifically listened for by the
16:14:20 17 receiver and to wake up. The data package is described
16:14:23 18 differently. It has data that is ...

16:14:27 19 THE COURT: No. I understand what you're saying.

16:14:30 20 MR. DINOVO: Okay.

16:14:30 21 THE COURT: I'm just saying that I don't get it,
16:14:32 22 because I'm agreeing with Mr. King here that I don't think it
16:14:40 23 matters what's in the synchronization packet if all it's going
16:14:49 24 to do is turn on the clock. You know, maybe it has pictures of
16:14:53 25 the President. Maybe it has a football game in it. But nobody

16:14:56 1 cares about it because it just turns on the clock.

16:15:00 2 MR. DINOVO: And so how does the -- if that were
16:15:02 3 true, Your Honor, how would the system know which offset to
16:15:06 4 measure?

16:15:08 5 THE COURT: Because it's -- well, that comes down to
16:15:12 6 what you aren't telling me. My presumption was until I heard
16:15:21 7 argument earlier of regular and irregular and when things come
16:15:27 8 through, that as soon as the clock went on, the next thing that
16:15:31 9 came through created the duration of the offset. That once it
16:15:39 10 started listening, the next thing that came through was what
16:15:43 11 stopped the clock, here's the offset, it goes to what Dr. Akl
16:15:56 12 called the -- what was it? Whatever he called the list, the
16:15:58 13 table -- the lookup table. That once it got the second
16:16:02 14 indication and stopped the clock and measured the offset, it
16:16:06 15 went to the lookup table to see what that offset was and that
16:16:12 16 told it where it got the data. That's what I hear them saying.

16:16:15 17 MR. DINOVO: The issue is, in order to measure an
16:16:17 18 offset, you have to measure, of course, between two timing
16:16:20 19 events. And the claim two, for example, talks about receipt --
16:16:24 20 listening for this on a periodic basis. So it's not going to
16:16:28 21 hear it every time. So the idea is that once it does hear a
16:16:32 22 synchronization packet, it's going to listen for the next data
16:16:34 23 packet and subtract them.

16:16:35 24 So we think the context of the patent is clear that
16:16:38 25 synchronization packet is a special type of packet that wakes

16:16:41 1 the system up and lets it know to start measuring an offset.

16:16:45 2 THE COURT: Now, he says it's not. Now, all I'm
16:16:48 3 doing is construing terms right now. I'm not deciding whether
16:16:51 4 it's indefinite, and I'm not deciding who wins. It sounds to
16:16:55 5 me like your argument is more a merits argument than it is a
16:16:59 6 claims construction argument. If CSR says that it doesn't
16:17:07 7 matter what's in the packet, then it doesn't matter what's in
16:17:13 8 the packet. That may be helpful or harmful to you. That may
16:17:18 9 mean you win your case because your argument is correct. But
16:17:21 10 that's not a claims construction argument, because nobody --
16:17:25 11 nobody has told me that there is specialized data in the
16:17:29 12 synchronization packet. You suspect it. You state that it has
16:17:34 13 to be. But I'm telling you that may be an indefiniteness
16:17:40 14 argument or a merits argument, but I don't think it's a claims
16:17:42 15 construction argument.

16:17:44 16 MR. DINOVO: All right.

16:17:45 17 THE COURT: And all I'm doing today is construing the
16:17:47 18 claims, and all my questions are going to construing claims and
16:17:52 19 coming up with what my construction is going to be. And so
16:17:57 20 whether it really helps you or it really hurts CSR doesn't
16:18:02 21 matter. If it is, there is a packet that hits the receiver and
16:18:11 22 turns on the clock and a packet that hits the receiver and
16:18:14 23 turns off the clock and the receiver -- its equipment measures
16:18:19 24 that offset, it goes to the lookup chart and says this is
16:18:24 25 coming from a cellular phone, that's what it's doing.

16:18:29 1 MR. DINOVO: The final issue I'll raise with that
16:18:32 2 approach, Your Honor, is that the system is not just
16:18:34 3 measuring. It's what claim one does, is identifying the device
16:18:38 4 based on the offset. The other thing it does and the
16:18:42 5 specification is clear about is that it -- it is intended to --
16:18:45 6 to notify the receiver that data is coming.

16:18:49 7 And so this notion that, well, I can send data to
16:18:55 8 wake up the system, that system, then, would not -- when it
16:18:58 9 started listening for the data in a predetermined window, it
16:19:01 10 would not have received the first data packet and that
16:19:03 11 communication would have failed. So the synchronization packet
16:19:07 12 is designed in this unilateral communication, according to the
16:19:09 13 patent specification, to let it know now you start listening
16:19:12 14 for data to be operated by the processor.

16:19:15 15 So in our view, a person of ordinary skill in the art
16:19:20 16 would understand this to be different types of packets and not
16:19:21 17 the same data. But I understand the Court's expressed its
16:19:24 18 view, and we'll move on.

16:19:25 19 THE COURT: No. But I just -- you-all are just
16:19:28 20 talking this way to me. You're saying a person ordinarily
16:19:32 21 skilled -- of ordinary skill in the art would think it's that
16:19:37 22 type of data, and you're saying that's not what they're
16:19:40 23 saying. How do I possibly reconcile that?

16:19:43 24 MR. DINOVO: I don't think Mr. King is in any better
16:19:46 25 position than us, because they acquired the patent from another

16:19:49 1 company.

16:19:49 2 THE COURT: Sure. But it's up to you to explain it
16:19:53 3 to me and to the jury and to make it clear. It's not up to me
16:19:57 4 to figure it out.

16:19:58 5 MR. DINOVO: Agreed, Your Honor. And I'm not envious
16:20:00 6 of being in a position where there's such lack of specificity
16:20:04 7 in the specification about it. I'm just using what little
16:20:07 8 there is in the short specification to discern that we think
16:20:10 9 that they're different types of packets. They use different
16:20:13 10 names. They didn't call it packet one and packet two. They
16:20:17 11 called it a synchronization packet and a data packet. And they
16:20:21 12 described functions that are associated with them. One is the
16:20:21 13 synchronization packet is used for sync and the data packet
16:20:24 14 contains data that is used for the processor. So we think they
16:20:28 15 are different.

16:20:29 16 THE COURT: Okay.

16:20:30 17 MR. DINOVO: Just very briefly, on the host
16:20:32 18 processing environment, we think that CSR's construction is
16:20:37 19 flawed because they read out the term "host." And so we have
16:20:40 20 documents from their production where they use the term "host"
16:20:44 21 to refer to a computer that has peripherals, which I'm happy to
16:20:49 22 hand up to the Court if it will be of utility. And this
16:20:52 23 document also, by the way, refers to packets that are of
16:20:55 24 digital nature. So if I can approach?

16:20:57 25 MR. KING: Your Honor, can I ask a question? Those

16:21:00 1 are -- what documents are these?

16:21:02 2 MR. DINOVO: These are documents that you produced.

16:21:04 3 MR. KING: These are CSR documents. We -- this is --
16:21:06 4 we don't practice this patent, so I'm not sure how this is
16:21:10 5 relevant to the patent.

16:21:11 6 MR. DINOVO: We think this document is relevant
16:21:13 7 because it shows how this term is used in the industry,
16:21:16 8 including by CSR.

16:21:17 9 MR. KING: And what's the date of this document?

16:21:20 10 MR. DINOVO: This is document is --

16:21:20 11 MR. KING: 2011?

16:21:21 12 MR. DINOVO: Yes.

16:21:22 13 MR. KING: So that's how many years after the patent
16:21:24 14 was filed?

16:21:25 15 MR. DINOVO: Are you contending that the meaning of
16:21:25 16 the term "packet" or "host" has differed?

16:21:26 17 MR. KING: The Court can consider it to whatever
16:21:29 18 extent it wants to, but this is ten years after the patent was
16:21:32 19 filed and it relates to a company that doesn't practice the
16:21:35 20 patent that used the term "host." I'm not sure what it's
16:21:39 21 proving.

16:21:40 22 THE COURT: Pretty extrinsic, Mr. DiNovo, but pass it
16:21:44 23 up here.

16:21:45 24 MR. DINOVO: All right.

16:21:46 25 THE COURT: I have yet to see the case where I had to

16:21:49 1 rely on extrinsic evidence. This may be it. But I don't think
16:21:54 2 I've ever rendered a Markman order where I got any particular
16:21:58 3 help from extrinsic evidence.

16:22:01 4 MR. DINOVO: And the *Phillips* case certainly does
16:22:05 5 express a preference for intrinsic, Your Honor.

16:22:07 6 THE COURT: Oh, I was that way before *Phillips*.

16:22:09 7 MR. DINOVO: Is that right? But so this document,
16:22:12 8 the reason we brought it up and it is extrinsic evidence, but
16:22:15 9 it's nice because on the front page it has two terms that are
16:22:20 10 in dispute. One is "host" and the other is "packet." And the
16:22:23 11 host here is described as the controlling party. This relates
16:22:27 12 to a -- a communications protocol that CSR uses called GAIA.
16:22:35 13 And we did not include it because this is a restricted outside
16:22:38 14 attorney's only document. But without getting into the
16:22:44 15 contents --

16:22:45 16 MR. KING: Can I just put one more thing on the
16:22:47 17 record? I'm sorry to interrupt.

16:22:48 18 MR. DINOVO: Of course.

16:22:48 19 MR. KING: This is also produced not in this case.

16:22:50 20 MR. DINOVO: And we have an agreement that all
16:22:52 21 evidence can be used in all cases.

16:22:54 22 MR. KING: I understand. I'm not disputing that.
16:22:57 23 I'm just saying I've never seen this document because this is a
16:22:59 24 document that has not been part of this case.

16:23:01 25 MR. DINOVO: Okay. And, again, briefly, Your Honor,

16:23:04 1 I'm not going to read the document because it has been
16:23:06 2 designated as attorney's eyes only. But it does refer to the
16:23:11 3 host as having peripherals in the wire protocol in section two,
16:23:13 4 and then it describes a packet format. And we would just point
16:23:15 5 out to the Court that this is consistent entirely with our
16:23:18 6 proposal of "packet" -- the packet is digital. It has specific
16:23:23 7 bit lengths. It's a collection. It's used for communication
16:23:26 8 as a unit. And so you'll see that the specific CSR packet
16:23:31 9 structure disclosed there on section 2.1.

16:23:33 10 That's all I had, Your Honor, unless you have a
16:23:39 11 question.

16:23:39 12 THE COURT: Tell me what your -- how you distinguish
16:23:41 13 a computer from a processor.

16:23:43 14 MR. DINOVO: I think a computer has more -- typically
16:23:46 15 has an input device. The reason that I think that "computer"
16:23:50 16 is a better term than a "processor," although, honestly, I
16:23:53 17 don't think the case is going to turn on this distinction, is
16:23:57 18 that a computer is going to have input/output, for example.
16:24:00 19 There is a technical definition of computer in that it has to
16:24:03 20 have an input/output. And so a processor theoretically might
16:24:08 21 not.

16:24:08 22 But the idea of a host here is that -- as depicted in
16:24:12 23 the drawing, is that it's going to have the ability to
16:24:14 24 communicate with peripherals. And the examples of course
16:24:18 25 consistently with our argument today in the -- of the

16:24:22 1 peripherals are both Bluetooth devices. One is a Bluetooth
16:24:27 2 keyboard, and one is a Bluetooth mouse. And so those
16:24:31 3 peripherals are attached to the host computer.

16:24:32 4 They use the term "processor." We can't argue with
16:24:33 5 it because it's in the term itself, but it's circular. So what
16:24:36 6 we're saying is the host processing environment is a little bit
16:24:40 7 bigger than the processor, and it includes the computer. And
16:24:43 8 the computer is not just a computer in isolation. As of -- as
16:24:47 9 a host, it has to have the capability to have peripherals. And
16:24:53 10 I think that's consistent with CSR's usage and consistent with
16:24:56 11 the definitions we've presented in our briefing.

16:25:01 12 THE COURT: All right. Thank you. I encourage you
16:25:04 13 now that you have heard what I've had to say -- which I suspect
16:25:08 14 has not been really exciting to either one of you, but I'm the
16:25:15 15 one that's got to wrestle with this and I'm the one at the end
16:25:19 16 of day that's got to figure it out -- to sit down based on my
16:25:23 17 comments and talk about -- we're not dealing with a lot of
16:25:27 18 definitions -- I mean, a lot of terms here -- and see if you
16:25:34 19 can work out some of your differences in these things. I don't
16:25:39 20 think that you're that far apart on language in a lot of these
16:25:48 21 things. And I think if you sit down and put your minds to it,
16:25:51 22 you ought to be able to reconcile this.

16:25:55 23 I say, again, that my goal is to get this case ready
16:26:00 24 to try. Patent cases are inherently difficult in that regard
16:26:07 25 because both -- you don't need -- you can sit down. You don't

16:26:13 1 need to stand up -- both the Congress and the courts keep
16:26:17 2 adding other levels. We've got to have a Markman hearing.
16:26:22 3 We've got to have a dispositive motion phase. We've got to
16:26:28 4 have a trial. There was a time when there was a big argument
16:26:32 5 about whether we ought to artificially insert another phrase --
16:26:37 6 another phase on willfulness. And the whole system appears to
16:26:43 7 me to be designed not to reach resolution, but to just keep us
16:26:51 8 going around in this loop.

16:26:55 9 My goal is to try to get this case to resolution, and
16:26:59 10 I think it would be helpful if you-all would take a look at
16:27:08 11 this. I can assure you I'm not going to give you an order that
16:27:11 12 gives you so many days. We're going to start working on this.
16:27:15 13 Clearly, it's going to take a while to get out a claims
16:27:18 14 construction order, but we're going to start on it right away.

16:27:25 15 It would be helpful if you could sit down with one
16:27:29 16 another and discuss some of the things that we have discussed
16:27:32 17 here today and see if you can clear up some of this. It would
16:27:36 18 be helpful to both of you, because otherwise what you get is
16:27:40 19 what I think and you don't get an interlocutory appeal on it.
16:27:47 20 So it lays -- it lies in the weeds until the case gets through
16:27:53 21 on the merits and goes up.

16:27:57 22 So I think it would behoove you to see if you can
16:28:01 23 work some of these things out. If you can't, that's fine. But
16:28:04 24 what you may get are claims constructions that nobody really
16:28:08 25 likes, because when I sit down and compare my notes to your

16:28:12 1 briefing and to the patent, I may come up with something
16:28:17 2 totally different from what we have discussed here today. So
16:28:21 3 it's worth thinking about, and it's worth something your
16:28:24 4 clients need to think about.

16:28:26 5 But I realize at least parts of you have trips to
16:28:35 6 Australia in the future, so you might not be able to get around
16:28:38 7 to this, at least based on what I heard on the telephone about
16:28:41 8 where the next round of discovery in the overall picture may
16:28:45 9 take place.

16:28:46 10 But thank you for your presentations today. Claims
16:28:48 11 construction is under advisement, and the Court will get
16:28:51 12 something out as quickly as possible. Court's in recess.

16:28:55 13 (End of transcript)

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1 **UNITED STATES DISTRICT COURT)**

2 **WESTERN DISTRICT OF TEXAS)**

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